Univerzita Karlova v Praze
Právnická fakulta

Diplomová práce

Freedom of Religion in European and International Law and Its Relation to Other Fundamental Rights (Svoboda náboženského vyznání v evropském a mezinárodním právu a její vztah k jiným základním právům)

Daniel Bartoň

Vedoucí práce: doc. Mag. phil. Dr. iur. Harald Christian Scheu, Ph.D.

Studijní program: Právo a právní věda

2008

Poděkování

Děkuji doc. Mag. phil. Dr. iur. Haraldu Christianu Scheuovi, Ph.D. za cenné rady, podněty a připomínky v průběhu přípravy diplomové práce.

Prohlášení

Prohlašuji, že jsem předkládanou diplomovou práci vypracoval samostatně za použití zdrojů a literatury v ní uvedených.

V Praze dne 12. května 2008 .....

Abstract

This essay explores freedom of religion or belief starting with religious and philosophical overview and elaborating especially on manifestations of religion or belief, and conflicts with other rights and freedoms guaranteed on national, European and international level (such as freedom of expression or right to education). It challenges division of religious freedom on *forum internum* and *forum externum* as being inappropriate to holistic perception of religion by many believers.

The essay focuses predominantly on the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case–law of the European Court of Human Rights which is interpreting and complementing the Convention. It also gives a brief overview of freedom of religion in the European Union (anti–discrimination legislation) and the United Nations and depicts their instruments for the protection of the freedom.

Contents

Bibliography

Books

Barton, John. *Ethics and the Old Testament*. English. London: SCM Press, 1998.

Clayton, Richard and Hugh Tomlinson. *The Law of Human Rights*. English. 1st ed. New York: Oxford University Press, 2000.

Ellis, Evelyn. *EU Anti-Discrimination Law*. English. New York: Oxford University Press, 2005.

Evans, Carolyn. *Freedom of Religion under the ECHR*. English. Oxford: Oxford University Press, 2001.

Evans, Malcolm D. *Religious Liberty and International Law in Europe*. English. Cambridge: Cambridge University Press, 1997.

Harris, David, Michael O'Boyle and Colin Warbrick. *The Law of the European Convention on Human Rights*. English. London: Butterworths, 1995.

Hošek, Pavel. *Na cestě k dialogu. Křesťanská víra v pluralitě náboženství*. Czech. Praha: Návrat domů, 2005.

Jäger, Petr and Pavel Molek. *Svoboda projevu. Demokracie, rovnost a svoboda slova*. Czech. 1st ed. Praha: Auditorium, 2007.

Kant, Immanuel. *Groundwork for the Metaphysic of Morals*. English. Trans. by Jonathan Bennett. 2005. URL: `http://www.earlymoderntexts.com/pdf/kantgw.pdf` (visited on 03/05/2008).

Robbers, Gerhard, ed. *State and Church in the European Union*. English. Baden-Baden: Nomos, 1996.

Saeed, Abdullah and Hassan Saeed. *Freedom of Religion, Apostasy and Islam*. English. Aldershot: Ashgate, 2004.

Traer, Robert. *Faith and Human Rights*. English. Washington, DC: Georgetown University Press, 1994.

Wittgenstein, Ludwig. *Philosophical Investigations*. English. 3rd ed. Oxford: Blackwell Publishers, 2001. URL: `http://www.galilean-library.org/pi7.html` (visited on 23/03/2008).

Chapters

An-Na'im, Abdullahi Ahmed. "Islamic Foundations of Religious Human Rights". In: *Religious Human Rights in Global Perspective. Religious Perspectives*. English. Ed. by John Witte and Johan D. van der Vyver. The Hague: Kluwer Law International, 1996.

Bobek, Michal. "Diskriminace z důvodu náboženství". In: *Rovnost a diskriminace*. Czech. Ed. by Michal Bobek, Pavla Boučková and Zdeněk Kühn. 1st ed. Praha: C. H. Beck, 2007.

Huber, Wolfgang. "Human Rights and Biblical Legal Thought". In: *Religious Human Rights in Global Perspective. Religious Perspectives*. English. Ed. by John Witte and Johan D. van der Vyver. The Hague: Kluwer Law International, 1996.

Kühn, Zdeněk. "Diskriminace v teoretickém a srovnávacím kontextu". In: *Rovnost a diskriminace*. Czech. Ed. by Michal Bobek, Pavla Boučková and Zdeněk Kühn. 1st ed. Praha: C. H. Beck, 2007.

Macklem, Timothy. "Reason and Religion". In: *Faith in Law*. English. Ed. by Peter Oliver. Oxford: Hart Publishing, 2000.

Novak, David. "Religious Human Rights in Judaic Texts". In: *Religious Human Rights in Global Perspective. Religious Perspectives*. English. Ed. by John Witte and Johan D. van der Vyver. The Hague: Kluwer Law International, 1996.

Witte, John. "Introduction". In: *Religious Human Rights in Global Perspective. Religious Perspectives*. English. Ed. by John Witte and Johan D. van der Vyver. The Hague: Kluwer Law International, 1996.

Articles

Boven, Theo van. "Speech on the 25th Anniversary Commemoration in Prague on 25 November 2006 of the adoption of the 1981 Declaration on the elimination of intolerance and discrimination based on religion or belief". English. In: (25th Nov. 2006). URL: `http://www.tolerance95.cz/1981down/Afternoon_Speech-Theo_van_Boven.doc` (visited on 20/04/2008).

Diehl, Jackson. "A Shadow on the Human Rights Movement". English. In: *The Washington Post* (25th June 2007). URL: `http://www.washingtonpost.com/wp-dyn/content/article/2007/06/24/AR2007062401373.html` (visited on 19/04/2008).

Farrow, Ronan. "The U.N.'s Human-Rights Sham". English. In: *Wall Street Journal* (29th Jan. 2008). A16. URL: `http://www.ngo-monitor.org/article.php?viewall=yes&id=1784` (visited on 19/04/2008).

"France: court confirms Charlie Hebdo editor's acquittal over Mohammed cartoons". English. In: *Reporters without Borders* (12th Mar. 2008). URL: `http://www.rsf.org/article.php3?id_article=26198` (visited on 25/03/2008).

Fuhrmann, Willi. "Perspectives on Religious Freedom from the Vantage Point of the European Court of Human Rights". English. In: *Birgham Young University Law Review* (2000). Pp. 829–840.

Greenawalt, Kent. "Religion as a Concept in Constitutional Law". In: *California Law Review* 72.5 (1984). Pp. 753–816.

Habermas, Jürgen. "Intolerance and discrimination". English. In: *International Journal of Constitutional Law* 1.1 (2003). Pp. 2–12. URL: http://icon.oxfordjournals.org/cgi/reprint/1/1/2.pdf (visited on 16/04/2008).

Hart, Laurel and Kim Assalone. "World Religious Leaders Reject Violence and "Hijacking of Religion" at Religions for Peace World Assembly". English. In: (26th Aug. 2006). URL: http://www.wcrp.org/files/PR-Opening-08-26-2006.pdf (visited on 05/05/2008).

Hassan, Riffat. "Religious Human Rights and the Qur'an". English. In: *Emory Int'l L. Rev.* 10.1 (1996). Pp. 85–96.

Hoge, Warren. "Dismay Over New U.N. Human Rights Council". English. In: *New York Times* (11th Mar. 2007). URL: http://www.nytimes.com/2007/03/11/world/11rights.html?ex=1331269200&en=3888d2c40656df4c&ei=5090&partner=rssuserland&emc=rss (visited on 19/04/2008).

Linden, René van der. "Speech during the Third European Ecumenical Assembly". English. In: (6th Sept. 2007). URL: http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Communication/PresidentSpeeches/2007/20070906_Sibiu-Romania.htm (visited on 01/05/2008).

Maoz, Asher. "Religious Freedom as a Basic Human Right. The Jewish Perspective". English. In: *Annuario Direcom* 5 (2006). Pp. 103–112. URL: http://ssrn.com/abstract=1013512 (visited on 04/05/2008).

Schimmelfennig, Frank and Guido Schwellnus. "The Constitutionalization of Human Rights in the European Union: Human Rights Case Studies and QCA Coding". English. In: (2004). URL: http://www.eup.ethz.ch/research/constitutional/fs-gs-dossier.pdf (visited on 23/04/2008).

Troost, Nanda. "A totalitarian power threatens us in Europe". English. In: *de Volkskrant* (10th Mar. 2008). URL: http://www.volkskrant.nl/binnenland/article511506.ece/A_totalitarian_power_threatens_us_in_Europe (visited on 28/03/2008).

Waddington, Lisa. "Testing the Limits of the EC Treaty Article on Non-discrimination". English. In: *The Industrial Law Journal* 28.2 (1999). Pp. 133–151.

Reports

Human Rights Committee. *General Comment 22, Article 18.* United Nations, 1993. URL: http://www1.umn.edu/humanrts/gencomm/hrcom22.htm (visited on 21/03/2008).

Krishnaswami, Arcot. *Study of Discrimination in the Matter of Religious Rights and Practices.* United Nations, 1960. URL: http://www.religlaw.org/interdocs/docs/akstudy1960.htm (visited on 20/04/2008).

Praesidium of the European Convention. *Explanations relating to the complete text of the Charter as set out in the Charter*. European Convention, 2000. URL: http://www.europarl.europa.eu/charter/pdf/04473_en.pdf (visited on 01/05/2008).

Ramberg, Ingrid. *Islamophobia and its consequences on Young People*. Council of Europe, 2004. URL: http://eycb.coe.int/eycbwwwroot/HRE/eng/documents/Islamophobia%20report/Islamophobia%20final%20ENG.pdf (visited on 06/05/2008).

UN Watch. *Dawn of a New Era? Assessment of the United Nations Human Rights Council and its Year of Reform*. United Nations, 2007. URL: http://www.unwatch.org/atf/cf/%7B6DEB65DA-BE5B-4CAE-8056-8BF0BEDF4D17%7D/DAWN_OF_A_NEW_ERA_HRC%20REPORT_FINAL.PDF (visited on 19/04/2008).

Vickers, Lucy. *Religion and Belief Discrimination in Employment — the EU law*. European Network of Legal Experts in the non-discrimination field, 2007. URL: http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/07relbel_en.pdf (visited on 27/04/2008).

Table of Cases

List of Abbreviations

CHR	Commission on Human Rights
CoE	Council of Europe
Commission	European Commission of Human Rights
Convention	European Convention for the Protection of Human Rights and Fundamental Freedoms
Council	Council of the European Union
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECJ	European Court of Justice or (Court of Justice of the European Communities)
ECOSOC	United Nations Economic and Social Council
ECRI	European Commission against Racism and Intolerance
ECSC	European Coal and Steel Community
EEC	European Economic Community
EP	European Parliament
EU	European Union
Euratom	European Atomic Energy Community
FRA	European Union Agency for Fundamental Rights
HCR	United Nations Human Rights Council
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
OIC	Organisation of the Islamic Conference
PACE	Parliamentary Assembly of Council of Europe
TEC	Treaty establishing the European Community
TEU	Treaty on European Union

TFEU ..... Treaty on the Functioning of the European Union

UDHR ..... Universal Declaration of Human Rights

UN ..... United Nations

1 Introduction

Recent years have been marked with emergence of religious feelings among people in regions that had considered "religious times" to be mere history. Awoken religiousness among people living in Europe for a long time in conjuction with immigration of religious people needed just a short time to come into tension with proclaimed European secularism.

For Europe is proud to respect deeply held religious feelings and beliefs. However, when it comes to expressing these beliefs in public and "living religion out", one gets into conflict with "neutrality" of public sphere.

This essey argues that for majority of religions, living them faithfully means not to differentiate between *forum internum* and *forum externum*. Once a religious person tries to live religion in its fullness he or she might get into conflict with secular European societies. There are some (typical) coflicting areas that deserves a special attention, so this essay tries to briefly address them.

One of the major topics in the media recently has been conflict of freedom of religion with freedom of expression, especially after cartoons of the Prophet Muhammad were published in various countries. Another area of long term struggles has been education with question raised such as extent of religious information contained in public education schemes, possibilities of "religiously neutral" education or following religious classes of particular religions in particular countries.

Although religious symbols were (have been) used all around Europe as part of (Christian) "cultural heritage", arrival of new religions requiring to be "symbolically" present in public brought endless discussions on which symbols and to what extent are allowed in a particular context.

It might seem that religious affiliation is something static. However, for majority of believers, religious life forms a sort of "journey". Usually people stay for their whole "spriritual journey" inside one religious system; however, there might be times of total reconsideration[1] and person might end up belonging to another religion. Thus question of proselytism arises, especially when one's personnal change is influenced by another individual. Approach to this question differes from one religious school to another, from court to court; therefore it might be valuable to try to understand some of the positions. This essay tries to depict different understanding to religion and aforementioned controversies in relation to legislation and case-law of various organs of the Council of Europe, the United Nations and the European Union. It tries to understand some of the tendencies present (if any) and formulate possible ways for the future.

As issues connected to religion and religious freedom are sometimes higly controversial and large variety of opinions exists, it is worth noting that this essay very much reflects its

[1] Total change of one's ways of thinking and living is represented e.g. in Christianity by concept of *metanoia*.

author who has background in Christian theology, is practising Christian, and is actively engaged in inter-religious dialogue (especially Christian-Muslim dialogue).
Let us conclude this introduction with quoting John Witte on relation of human rights and religions:

> Human rights norms provide no panacea to the world crisis, but they are a critical part of any solution. Religions are not easy allies to engage, but the struggle for human rights cannot be won without them. For human rights norms are inherently abstract ideals — universal statements of the good life and the good society. They depend upon the visions of human communities and institutions to give them content and coherence, to provide the scale of values governing their exercise and concrete manifestation. Religion is an ineradicable condition of human lives and communities; religions invariably provide universal sources and "scales of values" by which many persons and communities govern themselves. Religions must thus be seen as indispensable allies in the modern struggle for human rights. To exclude them from the struggle is impossible, and indeed catastrophic. To include them — to enlist their unique resources and protect their unique rights — is vital to enhancing and advancing the regime of human rights.[2]

[2]John Witte. "Introduction". In: *Religious Human Rights in Global Perspective. Religious Perspectives*. English. Ed. by John Witte and Johan D. van der Vyver. The Hague: Kluwer Law International, 1996, pp. xviii–xix.

2 Freedom of Religion as a Concept

2.1 Basic Distinctions

One of the basic distinctions that is usually drawn, is a distinction between positive and negative religious freedom. Positive religious freedom (*"freedom to"*) is a freedom of an individual to hold religion or belief and to manifest it in a reasonable way in public sphere, either alone or in community with others. Negative religious freedom (*"freedom from"*) is freedom of an individual not to be subject to coercion, indoctrination or propaganda in religious matters. This two-fold religious freedom has its counterpart in state's obligation to remain neutral in direction to all religions present (not to prefer one religion to another).[1] For this moment we leave aside real possiblity to stay neutral while being based on certain (Western) cultural and religious values and traditions.
Moreover, it is possible to go even beyond state's neutrality because as John Witte observes, the liberty dimension of religious rights requires that the state accommodate the religious beliefs and practices of individuals and associations and exempt them from generally applicable laws and policies which compel them to act, or to forgo action, in violation of their religious convictions. This may embrace conscientious objection from participation in the military, immunities from oath-swearing, from work on holy days, from payment of religious taxes, or from participation in civic cremonies and activities that they find religiously odious.[2]

While speaking about religion and human rights, David Novak differentiates between "religious liberty" (duty of society to respect and protect the right of every human person to worship any god of his or her choice or no god at all) and "the religious foundation of human rights". He does not see the two concepts as mutually exclusive or incapable of being connected, but he sees a difference in starting point. It is completly different perspective if one begins from religious rights along with other rights, and when one commence from religious source of rights (as it happens in Judaism, Christianity and Islam as they are religions of revelation).[3] Whereas primary concern of this essay is religious freedom (liberty), it is impossible not to address religion *per se* as a source or vehicle of certain human rights, particularly freedom of religion. If we were not addressing religious freedom as stemming out of religion, we would be hardly treating

[1] Michal Bobek. "Diskriminace z důvodu náboženství". In: *Rovnost a diskriminace*. Czech. Ed. by Michal Bobek, Pavla Boučková and Zdeněk Kühn. 1st ed. Praha: C. H. Beck, 2007, p. 285. Jürgen Habermas. "Intolerance and discrimination". English. In: *International Journal of Constitutional Law* 1.1 (2003). Pp. 2–12. URL: `http://icon.oxfordjournals.org/cgi/reprint/1/1/2.pdf` (visited on 16/04/2008), p. 8. Witte, "Introduction", p. xxvii.

[2] Witte, "Introduction", pp. xxvii–xxviii.

[3] David Novak. "Religious Human Rights in Judaic Texts". In: *Religious Human Rights in Global Perspective. Religious Perspectives*. English. Ed. by John Witte and Johan D. van der Vyver. The Hague: Kluwer Law International, 1996, p. 175.

inherent claims of religious people in fairly manner.

For law, it is quite important to come up with a definition of any social phenomenon that requires regulation. Following chapters show how complicated was the process of trying to distinguish what is religion and what is not, especially throughout negotiations of treaties and their subsequent interpretation by judicial bodies. It is, however, not possible for this essay to elaborate in detail on numerous definitions introduced by jurists, philosphers and theologians.
Nevertheless, it might be beneficial for us to mention, that e.g. for Leonard Swidler and John Witte the concept of religion embraces a creed, a cult, a code of conduct, and a confessional community. A creed standing for accepted cadre of beliefs and values concerning the ultimate origin, meaning, and purpose of life. A cult defined as the appropriate rituals, liturgies, and patterns of worship and devotion that give expression to those beliefs. A code of conduct meaning the appropriate individual and social habits of those who profess the creed and practice the cult. And a confessional community being the group of individuals who embrace and live out the creed, cult, and code of conduct, both on their own and with fellow believers.[4]

It is quite typical for Europe in post-Englightenment period to put emphasis on the individual, and individual aspects of freedom. This applies also to the whole concept of "freedom of religion, thought and conscience" which evokes that the primary concern of protection is an individual and its integrity. The idea of collectivity and of communal rights left legal thinking for some time and has been returning from time to time e.g. in claims of self-determination of nations. It is important to re-accept corporate religious rights as essential part of religious freedom.[5]

John Witte describes interest in the subject of religious human rights after the World War II which was part of broader "rights revolution". However, after the 1950s, academic inquiries and activist interventions into religious rights and their abuses became increasingly intermittent and isolated, inspired as much by parochial self-interest as by universal golden rules. This depreciation of religious rights was interconnected with political pressure to address the most glaring rights violations and abuses, especially of physical nature.[6]
He notes that this depreciation of religious rights has sharpened the divide between Western and non-Western theories of rights. Many non-Western traditions, particularly those of Islamic, Hindu, Buddhist, Taoist, and indigenous stock, cannot conceive of, nor accept, a system of rights that exclude religion. Religion is for these traditions inextricably integrated into every facet of life and no system of rights that ignores or deprecates the cardinal palce of religion can be respected or adopted. The depreciation

[4] Witte, "Introduction", p. xxv.
[5] For this idea plead numerous authors, for an overview see e.g. Witte, "Introduction", p. xxvi.
[6] Witte, "Introduction", pp. xxx–xxxii.

of religion has also exaggerated the role of the state as the guarantor of human rights. The state is not, however, and cannot be, so omnicompetent, and vast plurality of voluntary association (religious among others) is necessary for cultivation and realization of human rights.[7] This depreciation of public role of religious communities and surrender to state has been more then visible in post-communist Europe.

While studying freedom of religion in a particular region, it is necessary to take into consideration what is the relation of various religious groups with state (or other local authority) and why is it so (historical background). It is not possible for this essay to elaborate on various models that have appeared throughout history all around the world. Nevertheless, we may note that on the one hand, there are exmples of clear separation of church(es) and state as in the Unitited States of America or in France, which is built upon the concept of laïcité. On the other hand, there are states with a special connection to a particular religion, the most "extreme" case being theocracy (such as arguably Iran or Saudi Arabia), or supposedly less interconnected models being national or established churches. Typical example of established church is Church of England (Anglican church). National churches are symptomatic for Northern European (predominantly) Lutheran states (Denmark, Norway, Sweden, Finland and Iceland) and for (predominantly) Orthodox countries (e.g. Greece, Romania, Russia or Georgia). Quite specific model might be observed in predominantly Roman-Catholic states (such as Italy, Spain or Poland), where Roman-Catholicism enjoys special status (although not always officialy recognized).

2.2 The Historical Justification and Human Dignity

A possible argument raised sometimes as a rationale for religious freedom looks to the history of persecution on the basis of religion or belief in Europe. This argument can be construed so as to claim that there is nothing particularly important about freedom of religion as such except of the fact that historically religion has been used as a basis to justify persecution and repression.[8]

Indeed, even religious leaders admit that religion "has been hijacked" by extremists, politicians and the media.[9] Though it would be too black-and-white to perceive "hijacking of religion" only negatively. As William Vendley put it, "whenever extremists attempt to hijack religion for violent ends, whenever politicians seek to exploit sectarian differences, and whenever the press mischaracterizes our faith traditions, people of faith, religious

[7] Witte, "Introduction", pp. xxxiii-xxxiv.

[8] Carolyn Evans. *Freedom of Religion under the ECHR*. English. Oxford: Oxford University Press, 2001, p. 24.

[9] Laurel Hart and Kim Assalone. "World Religious Leaders Reject Violence and "Hijacking of Religion" at Religions for Peace World Assembly". English. In: (26th Aug. 2006). URL: `http://www.wcrp.org/files/PR-Opening-08-26-2006.pdf` (visited on 05/05/2008).

communities and religious leaders must stand up, speak out and take action."[10] Thus, "hijecking of religion" might serve also as an incentive for religious people to reflect upon their faith and its manifestations and re-establish their relation towards the "outer world." Carolyn Evans admits that historical basis for the protection of freedom of religion is not a satisfactory answer to the question of why freedom of religion is valuable. It may be a partial explanation of why discrimination on the basis of religion and belief is specifically prohibited in Article 14 of the Convention (along with other forms of discrimination), but it does not explain why it is that people should not only have the right to be free from torture, execution, and so forth on the basis of religion but should also have a positive right to freedom or religion or belief. Neither does it explain why the exercise of one's religious freedom was considered an inappropriate basis on which to discriminate against a person.[11]

Another possibility how to approach religious freedom is to start with human dignity. This way is followed both by secular philosophers and religious scholars.
An *ethic of dignity* (in comparison with *ethic of interest*) is rooted in a basic rediscovery of the Protestant Reformation. It states that the human person is not created by his or her own performance and cannot achieve final recognition through his or her own works. Not human perfection but Godly grace constitues the human person. Human dignity is not dependent on the disposition of other humans, nor on the powers of society or the state. The human person in his or her limited time is granted an unending dignity that is not product of human efforts but rather a pure, unearned gift of God.[12]
After the Protestant Reformation, the *ethic of dignity* also assumed secular forms. Immanuel Kant posed the categorical imperative in a way that requires one to acknowlege humanity in the person of another as in oneself — not simply as means, but equally as an end in itself.[13] This formula repreats the thought that no human person can lay complete claim to dispose of, or to define, another person.[14]

2.3 Religious Freedom and Religious Tolerance

The linkage between religious toleration and democracy occurs from both sides: on the part of politics, which switches the basis for its legitimation over to a pluralist worldview, and on the part of religion, which locks the moral and legal principles of secular society

[10] Hart and Assalone, "World Religious Leaders Reject Violence and "Hijacking of Religion" at Religions for Peace World Assembly".

[11] Evans, *Freedom of Religion under the ECHR*, pp. 24–25.

[12] Wolfgang Huber. "Human Rights and Biblical Legal Thought". In: *Religious Human Rights in Global Perspective. Religious Perspectives*. English. Ed. by John Witte and Johan D. van der Vyver. The Hague: Kluwer Law International, 1996, p. 55.

[13] Immanuel Kant. *Groundwork for the Metaphysic of Morals*. English. Trans. by Jonathan Bennett. 2005. URL: `http://www.earlymoderntexts.com/pdf/kantgw.pdf` (visited on 03/05/2008).

[14] Huber, "Human Rights and Biblical Legal Thought", p. 56.

onto its own ethos. With the depoliticization of the dominant religions and the inclusion of religious minorities in the political community as a whole, the spread of religious toleration also acts, within democracy, as a stimulus and model for the introduction of further cultural rights. Religious pluralism kindles and fosters sensitivity to the claims of discriminated groups in general.[15]

Jürgen Habermas exposes concept of tolerance by analyzing German term *Toleranz* which designates the general disposition to treat another person or a stranger patiently and generously; more specifically, it is used in reference to a political virtue in our dealings with citizens who are different or are of a different origin. *Toleranz* is considered a core component of liberal political culture. That said, *Toleranz* is not the same as the virtue of "civil" behavior. It must not be confused with the mere willingness to cooperate and compromise, for each person's respective truth claims cannot be a matter for negotiation when they conflict with the truth claims of someone else. Toleration first becomes necessary when one rejects the convictions of others: We do not need to be tolerant if we are indifferent toward other beliefs and attitudes or even if we appreciate otherness. Later, religious toleration toward those holding different beliefs is generalized to constitute what is in the broadest sense political tolerance of people who think differently; but in both cases the "component of rejection" is material.[16]

In case of judgement rejecting a religion, the appropriate answer is a critique of prejudices and combating of discrimination, in other words the fight for equal rights, and not "more tolerance." With people who think differently or have different beliefs from our own, and were discriminated against as a result of prejudices, the question of toleration first arises after these prejudices have been eliminated.[17]

The end of a form of discrimination does not always signify the beginning of toleration toward the person whom is no longer discriminated against. However, only in the case of competing worldviews does toleration mean accepting mutually exclusive validity claims. In this narrowly defined sense, toleration — as regards equal respect for everybody — means the willingness to neutralize the practical impact of a cognitive dissonance that nevertheless in its own domain demands that we resolve it.[18]

2.4 Religious Arguments

2.4.1 Generally

All "basic texts" (holy scriptures) of the major world religions contain some teachings that can be interpreted in a way to uphold freedom of religion and belief. Thus, it is

[15] Habermas, "Intolerance and discrimination", p. 8.
[16] Habermas, "Intolerance and discrimination", p. 3.
[17] Habermas, "Intolerance and discrimination", p. 3.
[18] Habermas, "Intolerance and discrimination", pp. 11–12.

possible to argue that, properly understood, all religions are or should be supportive of the right to religious freedom as a good in and of itself. Conversly, Carolyn Evans and Robert Traer claim that religious tolerance may be part of the teaching of some religions, but it is not common to all religions, and even religious groups that share some commitment to a notion of freedom of religion may disagree fundamentally as to the meaning of and limits to that freedom.[19]

Support of religious freedom in world religions, however, should not be about "proper understanding" of religious teachings, especially as it is argued in modern hermeneutics that finding the "proper understanding" is not possible. It is rather about assumptions and understanding from the situation of the interpreter.

It is difficult to state what "religion says" as religion is fundamentally based on revelation or other transcendental experience. Nevertheless, the phrase "religion says", "religion orders you" has been used quite often to reach certain goals of the people in power. And it is exactly the situation when religion is used (misused or "hijacked") for non-religious purposes; and it is highly questionable whether religion could (or should) be blamed for this. If religion is to blame, could we blame also race, gender or sexual orientation by themselves?

David Novak notes that ancient religious texts cannot function as precedents for moral principles that are already formulated fully in and for the present. For when this is done, the continuing moral necessity of reading these texts becomes lost because the principles of which these texts are precedents are assumed to be true in and of themselves here and now. They are taken to be self-sufficient even if not always self-evident. And, indeed, anything but tangential concern with these ancient precedents might actually be practically counterproductive by diverting attention away from the real and pressing concerns to which moral principles are always to be addressed.[20]

John Barton warns us that the Old Testament (and we may consider ancient texts in general) cannot be understood as a book full of binding commandments, laws and oders as we are used to from Western moral philosophy. Old Testament writers were desperately unsystematic, however, they show us that what really matters are "simple everyday acts". And he points out that half of the volume consists of stories. Stories which are multilayered narrative structures without possibility of simplification to one or two moral points.[21] This understanding may give us a lead in how to treat ancient religious texts. The most appropriate way of understanding religious freedom would be meditating over ancient narratives instead of using haphazard sentences as "commandments" or "moral orders" and interpreting them from current legal viewpoint. This approach, however, is not very easy to adopt, it is time consuming, and it almost excludes possibility of "modern

[19] Evans, *Freedom of Religion under the ECHR*, p. 26; Robert Traer. *Faith and Human Rights*. English. Washington, DC: Georgetown University Press, 1994, pp. 3–6.

[20] Novak, "Religious Human Rights in Judaic Texts", p. 177.

[21] John Barton. *Ethics and the Old Testament*. English. London: SCM Press, 1998.

scientific analysis". Therefore we cannot use it as a basis for this essay; nonetheless, it should be born in mind.

It is rather impossible to give a brief overview of the concept of religious freedom in various religions and faith traditions. Especially as statements to this controversial issue are not unanimously held by all adherents to a particular faith. On the following pages we shall focus on some basic concepts and ideas that may serve as grounds for better understanding freedom of religion in Judaism, Christianity and Islam.

2.4.2 Judaism

It is quite complicated to speak about religious freedom in a religion that is devoted to One God who bestowed a special status on the Chosen people. Judaism might be in this discourse interpreted as an exlusivist religion that cannot grant any favourable position to people believing in other gods (considered as idols). However, many scholars would not agree with this assumption on theological basis as there are also non-exlusivist texts[22] and interpretations. Moreover, given the historical experience of Jews scattered all around the world and being persecuted wherever they have been, high value of religious freedom should be understandable.

The term "freedom of religion" does not appear in Jewish classical texts as such. It may, however, convey two different messages: the freedom of "the other" to adhere to a different religion and the tolerance towards different streams withing your own faith, as well as towards non-religious members of your community. In Judaism this dilemma is further complicated by the fact of being nation-religion.[23]

As for the Jewish teaching about the the nations, Asher Maoz (based on Maimonides) differentiates between the Covenant of the Rainbow (done with Noah after the flood) on the one hand, and Torah and the commandments given to Moses on the other. Whereas the seven Noahide commandments were given to all the people, the Torah and the commandments only to the people of Israel (and those who would like to join them).[24] Following the one or the other set of rules has different connotations and consequences, especially in the Messianic age; nevertheless, it leaves people with certain religious freedom.

We may find in Judaic classic teachings harsh statements regarding idolatry. The idolatry is sometimes interpreted as worshiping things (objects) instead of God, as deviation of *latreia* (adoration, worship). Idolatry is not directed agaist people who worship God in

[22] Take for example (anti-)prophet Jonah who was sent by God to proclaim judgment over Nineveh. However, God took pity on the people who realized that their ways were not righteous, and repented. It is rather ironic to observe Jonah afterwards not being able to understand merciful God who just forgave the wrongdoers from the gentiles.

[23] Asher Maoz. "Religious Freedom as a Basic Human Right. The Jewish Perspective". English. In: *Annuario Direcom* 5 (2006). Pp. 103–112. URL: `http://ssrn.com/abstract=1013512` (visited on 04/05/2008), p. 104.

[24] Maoz, "Religious Freedom as a Basic Human Right", pp. 105–107.

other ways, but against people who worship things that are not worthy of worship.
Asher Maoz summarizes positions of various Jewish authorities on relation to Christianity and Islam that are not considered to be idolatries. Moreover, Chrstianity and Islam are regarded as legitimate religions and praised for removing the idols and subordinating their nations to Noahide laws, thus giving them "moral attributes" far beyond what was demanded of them by the Torah of Moses.[25]
Human persons in Judaism are regarded as sojourners in the world, who can only find their dwelling in the world when they realize that their authentic identity is neither derived from the world nor from themselves. That identity comes from being related to the One who himself transcends the world and directs it, the One to whom the world is always immanent.[26] This concept gives particular freedom to people because human dignity and rights are not dependent on any earthly decision. It might be argued that religious freedom on this basis contributed to persistance of Jewish communities.
The concern for justice is to include just dealings with those outside the community itself; indeed, injustice towards the gentiles, for the Rabbis, entail the sin of "profanation of God's name". Such injustice prevents the gentiles from admiring the inherent justice of the Torah and to praise the God who gave it as well as to desire to appropriate it. Such injustice would not inspire them to come to Jerusalem for the just response to their rights claims.[27] [28]
Jewish tendency to grant as much freedom to "the others" as necessary for for the true life of community might be also observed on the process of eradicating slavery. Although slavery had particular regulations in the Torah, when Rabbi Eliezer needed tenth person for starting the prayer, he did not hesitate to set a slave free for the community to be able to worship together.[29]

As religious freedom inside Judaism is concerned, it is important to note that the Covenant on Mt. Sinai was made with all the men of Israel including their children and children's children. Therefore, all Children of Israel are bound by the Covenant and

[25]Maoz, "Religious Freedom as a Basic Human Right", p. 108.
[26]Novak, "Religious Human Rights in Judaic Texts", p. 185.
[27]Novak, "Religious Human Rights in Judaic Texts", p. 192.
[28]This "coming of nations to Jerusalem" is explained by eschatological vision of prophet Micah: "But in the last days it shall come to pass, that the mountain of the house of the LORD shall be established in the top of the mountains, and it shall be exalted above the hills; and people shall flow unto it. And many nations shall come, and say, Come, and let us go up to the mountain of the LORD, and to the house of the God of Jacob; and he will teach us of his ways, and we will walk in his paths: for the law shall go forth of Zion, and the word of the LORD from Jerusalem. And he shall judge among many people, and rebuke strong nations afar off; and they shall beat their swords into plowshares, and their spears into pruninghooks: nation shall not lift up a sword against nation, neither shall they learn war any more. But they shall sit every man under his vine and under his fig tree; and none shall make them afraid: for the mouth of the LORD of hosts hath spoken it." (Micah 4:1–4; cited according to King James Version.)
[29]Novak, "Religious Human Rights in Judaic Texts", pp. 198–200.

are not free to deviate from the paths of the Torah.[30]
According to Babylonian Talmud, "all Israelites are guarantors to each other."[31] Therefore, it is the duty of each and every Jew not only to abide by *Halakha*[32], but also to make sure that their fellow Jew abides by it. It is the behavior of each and every Jew that may influence the revelation of eternal salvation.[33]
The issue of religious freedom inside Judaism might be even more complicated. It is possible to say that while there is freedom of thought, it is not so with action. The function of adjudicating difficult questions lied with the Great Sanhedrin and any scholar who went against its decisions was regarded a rebellious elder and theoretically liable to capital punishment. However, the scholar does not become a rebellious elder by merely teaching his opposite opinion but only if he instructs others to act in accordance with his minority dissent opinion.[34]
The Talmud is full of conflicting opinions and both majority and minority opinions are regarded to be "words of the living God." It does not regard the ruling opinion of the majority as more right then the minority opinion. Moreover, the minority opinion is said to be included because it might become majority one in the future.[35]
The right to deviate from the majority opinion is not restricted to academic sphere. Since the abolition of the Sanhedrin, Judaism lacks a central decisive authority. The custom is that every Jew may choose the rabbi whose ruling in *halakhic* matters he will obey (but not completly arbitrarily).[36]

2.4.3 Christianity

In Christianity, as in some other religions, it might be said that religious freedom has developed and flourished in places where there was necessity for various groups to coexist. It has been also closely interconnected with access of religious leaders to earthly (secular) power. In the first centuries when the Church was persecuted, Christians had to live in diversity and solve disputes mainly by the way of dialogue. However, when the church officials got close to state power, use of state repression was at hand. And most of the time when church had possibility to be involved in politics and use oppresive methods, religious freedom suffered. Dissenting people were excomunicated, condemned or stigmatized.
Good example of church that has been since its foundation comprising radically different

[30]Maoz, "Religious Freedom as a Basic Human Right", p. 109.
[31]Babylonian Talmud, Tractate Shevuoth [Oaths], 39a.
[32]Halakha is the collective body of Jewish religious law, including biblical law (the 613 mitzvot) and later talmudic and rabbinic law, as well as customs and traditions. Halakha could be translated as "the path" or "the way of walking."
[33]Maoz, "Religious Freedom as a Basic Human Right", p. 109.
[34]Maoz, "Religious Freedom as a Basic Human Right", p. 110.
[35]Maoz, "Religious Freedom as a Basic Human Right", p. 111.
[36]Maoz, "Religious Freedom as a Basic Human Right", p. 111.

groups of believers is Anglican church (Anglican Communion). It is no supprise then that many promoters of religious freedom lived at least for some time in close contact with the Anglican Communion and got inspired by it.
Nowadays, various Christian groups try to promote idea of peaceful and enriching life together — and have formed the ecumenical movement. During the history of ecumenical movement, many people realized that uniting all Christians under one organizational scheme is an utopia. Thus, they started to develop various models of different Christians living together. What is common to majority of these models is, that there is a necessity to grant freedom to the others. And even if you do not agree with your fellow Christians and you are not able to identify yourself with their teaching, you leave them space to be different and still Christian.
It might be said that for Christians it should be easy to respect each other in his or her differences as there is a common ground, i.e. all Christians "confess the Lord Jesus Christ as God and Saviour according to the Scriptures, and therefore seek to fulfil together their common calling to the glory of the one God, Father, Son and Holy Spirit."[37] Yet, history of religious conflicts among Christian denominations complicates this thesis. Nevertheless, ecumenical learning and openess to "Christian others" paves a way of understanding and granting religious freedom also to non-Christians. This happens both on the basis of "mere pragmatic tolerance" of the others and on the basis of soteriological inclusivism claiming that also other believers (may) reach to salvation.

Wolfgang Huber describes the path by which the Biblical motif affected Western legal development as divided into five stages. *The first stage* commenced with the Christianization of the Roman Empire when legal institutions, often closely connected with the Roman state religion, were transformed to reflect Jewish and Christian ideas of morality. This Christianization of the Roman Empire effected secularization of Christianity and the definitive emancipation of Christianity from its Jewish roots. The radical nature of the Christian mission was thereby weakend. Even the ideas it incorporated of a right created from the perspective of the weak were adapted to the prevailing power structure.[38]
The second stage came with "the Papal Revolution" (cca 1050–1200) when comprehensive systematization of legal rules was brought. The newly systematized law was grounded in principles of natural law; and as the principles of natural law could be discovered by revelation but could be also recognized through the use of reason, this step implied an epochal emancipation from the Biblical roots. Thus, argues Huber, the secularization of Western legal thought began definitely not in the modern period, but with the transformations born of Constantine as well as the Papal Revolution. Particularly momentous

[37] This formula is used by the World Council of Churches as a "common basis" since joining of the Orthodox churches in 1960s.
[38] Huber, "Human Rights and Biblical Legal Thought", pp. 48–49.

was the image of the human person that was conceived as a (Christian) individual, for personhood was established through the act of baptism. Nevertheless, although the Papal Revolution substantially shifted the concept of the individual human person to the center of the legal system, it was still far removed from the idea of universal human rights.[39]

The third stage of the influence of the Biblical motif on Western legal development came with the Protestant Reformation. The Reformers recognized the autonomy of legal relationships against ecclesiastical claims of authority. Freedom of conscience and of religion were recognized as frontiers at which claims of authority by the political power should find their limit. Together with the impetus of Renaissance humanism and late scholasticism, the Reformation paved the way for a turning point in the human image that urged recognition of the equal dignity of all men.[40] Political arrangements after Peace of Augsburg done accordingly to "cuius regio, eius religio" went hand in hand with the idea of religious self-determination of an individual.

As *the fourth stage* is seen the era of positivism following the finding that legal system must be contructed on some other basis then religion (due to bloody sectarian conflicts). The state itself became a source of law. And as the state authority needed some counterpoises, human a civil rights needed to be codified. Whereas the American development arose from a spirit of Christian Enlightenment, French revolution was made by an anticlerical enmity against Christianity. The latter heigtened the impression that Christian legal thought and modern awareness of human rights are worlds apart and resulted in Christian theology not adopting interpretation of human rights for more then two centuries.[41]

The Age of Enlightenment also saw creation of the preconditions for *the fifth stage* of Biblical influence on the Western legal consciousness. These preconditions lay principally in the rediscovery of human subjective responsibility and autonomy. The decisive conclusion was that all claims to validity must be created anew in the rationality of the human subject. However, for recognition of human person in its legal subjectivity as the decisive reference point for legal thought, experience of Nazism and Stalinism was needed.[42]

Wolfgang Huber further notes that the Biblical tradition was frequently cited throughout all five stages. This suggests a caveat that modern law (including human rights theory) can be coupled with Biblical legal thought only from afar and at the level of principle. On the one hand, Biblical legal thought should not be used simply to define and legitimate the structure and content of modern legal systems. On the other hand, it is incorrect to separate the legal system from the question of the theological basis for its validity and

[39]Huber, "Human Rights and Biblical Legal Thought", pp. 49–50.
[40]Huber, "Human Rights and Biblical Legal Thought", pp. 50–51.
[41]Huber, "Human Rights and Biblical Legal Thought", pp. 51–52.
[42]Huber, "Human Rights and Biblical Legal Thought", p. 52.

to leave it to its "self-legality".

Huber suggests that we find ourselves today on the threshold of *a sixth stage* as the process of modern subjectivization and individualization has been bringing self-destructive consequences.[43] Or as David Novak puts it, the challenge for a presentation of religious human rights in the world today is to avoid the emptiness of individualistic rights talk without falling into the trap of the excesses of collectivism.[44] For this time Biblical concept of justice might help us as it aims not simply to enable each person to receive his or her lawful rights, but rather to ensure rights for the other and to enable the community to survive under conditions of equal freedom for all.[45]

Wolfgang Huber builds on the concepts of *Weltethos* which has been developped by Hans Küng. Huber thinks that we face the task of developing a planetary legal consciousnes, whose validity rests upon the principles of a planetary ethos. He notes that Western legal thought has lost sight of maintaining viability of Planet Earth and ensuring dignified living conditions for humanity based on cooperation beyond the borders of cultural tradition and religious conviction because of its blindness to the religious dimensions of law. On account of this blindness, Western legal thought frequently stands uncomprehendingly opposed to the coupling of law and religion in other traditions. Omitting the religious dimensions of law, however, further deepens the gulf between Western and non-Western legal conceptions. For believers in Islam, Buddhism, Hinduism, or Confucianism assume the inner unity of law and religion.[46]

Wolfgang Huber observes that discovery of Christian freedom in the Protestant Reformation and the understanding of the need for religious toleration prepared the ground for the modern development of human rights. To this extent, a central element of all human rights is the guarantee of freedom of conscience, belief, and religion. The inalienability of the human person, and the untaouchability of human dignity, can be guaranteed only if religious beliefs and their individual and corporate expression remain free from all external constraint. He thinks that this idea must be foreign to Biblical legal thought, for the coupling between giving honor to only one God and the legal form of community life is so narrowly conceived that the recognition of an equal right for those professing another faith does not arise.[47] At this point it is possible to argue that Biblical thinking is not always that exclusivist, but creates also certain space for people believing in different way. And not only in practical everyday arrangements but also in eschatological perspective and as salvation is concerned.[48]

[43]Huber, "Human Rights and Biblical Legal Thought", p. 53.

[44]Novak, "Religious Human Rights in Judaic Texts", p. 181.

[45]Huber, "Human Rights and Biblical Legal Thought", p. 54.

[46]Huber, "Human Rights and Biblical Legal Thought", p. 54.

[47]Huber, "Human Rights and Biblical Legal Thought", pp. 58–59.

[48]This is, however, set of questions widely disputed for the whole history of Christianity. For an overview of various approaches see e.g. Pavel Hošek. *Na cestě k dialogu. Křesťanská víra v pluralitě náboženství.* Czech. Praha: Návrat domů, 2005.

2.4.4 Islam

In case of Islam it is even more important to note for a European reader, that it is impossible to present a teching that would be applauded by all the Muslims. This subsection tries to introduce positions that are not major in presentations of Islam in Western media. The fact of underrepresentation in Western media, however, does not mean underrepresentation among faithful Muslims.

As a matter of terminology, it is necessary to clarify that no distincion was made in the work of early Islamic scholars, or in the minds of their followers, between law and theology. Subject-matters ranging from legal, in the modern sense of the term, to that pertaining to belief and doctrine, ethics and morality, religious ritual practices, style of dress, hygiene, courtesy, and good manners, were all seen as falling within the domain of *Shari'a*, the divinely ordained way of life.[49]

Abdullahi An-Na'im states that commitment to human rights enhances the quality of religious belief and the relevance and utility of its precepts to the lives of its adherents. By its very nature, and in order to influence effectively the moral convictions and daily behavior of those who subscribe to it, religious belief must be voluntarily adopted and maintained. Coerced belief is a contradiction in terms, and can only breed hypocrisy, social corruption, and political oppression.[50]

Riffat Hassan believes that the Qur'an is the Magna Carta of human rights and that a large part of its concern is to free human beings from the bondage of traditionalism, authoritarianism (religious, political, economic, or any other), tribalism, racism, sexism, slavery or anything else that prohibits or inhibits human beings from actualizing the Qur'anic vision of human destiny embodied in the classic proclamation: "Towards Allah is thy limit."[51][52]

The greatest guarantee of personal freedom for a Muslim lies in the Qur'anic decree that no one other than God can limit human freedom,[53] and in the statement that "judgment (as to what is right and what is wrong) rests with God alone."[54][55]

The Qur'anic proclamation "there shall be no coercion in matters of faith"[56] guarantees freedom of religion and worship. This means that, according to Qur'anic teaching, non-

[49] Abdullahi Ahmed An-Na'im. "Islamic Foundations of Religious Human Rights". In: *Religious Human Rights in Global Perspective. Religious Perspectives.* English. Ed. by John Witte and Johan D. van der Vyver. The Hague: Kluwer Law International, 1996, p. 336.

[50] An-Na'im, "Islamic Foundations of Religious Human Rights", p. 336.

[51] Surah 53: An-Najm: 42.

[52] Riffat Hassan. "Religious Human Rights and the Qur'an". English. In: *Emory Int'l L. Rev.* 10.1 (1996). Pp. 85–96, p. 85.

[53] Surah 42: Ash-Shura: 21.

[54] Surah 12: Yusuf: 40.

[55] Hassan, "Religious Human Rights and the Qur'an", p. 90.

[56] Surah 2: Al-Baqarah: 256. In authorized English translation of the Qur'an is maybe more famous wording: "There shall be no compulsion in religion."

Muslims, living in Muslim territories, should have the freedom to follow their own faith-traditions without fear or harassment. A number of Qur'anic passages state clearly that the responsibility of the Prophet Muhammad is to communicate the message of God and not to compel anyone to believe. The right to exercise free choice in matters of belief is unambiguously endorsed by the Qur'an which states: "The Truth is from your Lord: Let him who will believe, and let him who will, reject (it)."[57][58]

The Qur'an also makes clear that God will judge human beings not on the basis of what they profess but on the basis of their belief and righteous conduct: "Those who believe (in the Qur'an) and those who follow the Jewish (scriptures), and the Christians and the Sabians, any who believe in God and the Last Day, and work righteousness, shall have their reward saith the Lord; on them shall be no fear, nor shall they grieve."[59][60]

There are references to Jews and Christians in the Qur'an containing both praise and criticism. In its criticism of their beliefs and practices, the Qur'an did not ever criticize the religions of Judaism or Christianity as scuh, nor the status of their Scriptures represented by the Torah and the Gospel. Both Judaism and Christianity were respected as religions of the "Book" alongside Islam. The Qur'an, however, saw itself as the Scripture that had come to "confirm" what was in the Torah and the Gospel, and as the determiner of what was genuine of the earlier revelations.[61]

Degree of tolerance that was afforded to Christianity and Judaism differed from the one afforded to non-revealed religions. There was no recognition of beliefs and practices that involved idolatry (similarly to Judaism). Despite the non-recognition, the Qur'an urged Muslims to deal with all people, including idolaters, with respect, as long as they too showed respect. Indeed, the Muslims were commanded not to abuse or slander even the deities of idolaters.[62]

In the context of the human right to exercise religious freedom, it is important to mention that the Qur'anic dictum, "Let there be no compulsion in religion"[63] applies not only to non-Muslims but also to Muslims. While those who renounced Islam after professing it and then engaged in "acts of war" against Muslims were to be treated as enemies and aggressors, the Qur'an does not prescribe any punishment for non-profession or renunciation of faith. The decision regarding a person's ultimate destiny in the hereafter rests with God.[64]

However, as Abdullah Saeed notes, many Muslims today argue that Islam is the true and

[57] Surah 18: Al-Kahf: 29.

[58] Hassan, "Religious Human Rights and the Qur'an", p. 90.

[59] Surah 2: Al-Baqarah: 62

[60] Hassan, "Religious Human Rights and the Qur'an", p. 90.

[61] Abdullah Saeed and Hassan Saeed. *Freedom of Religion, Apostasy and Islam.* English. Aldershot: Ashgate, 2004, p. 21.

[62] Saeed and Saeed, *Freedom of Religion, Apostasy and Islam*, p. 21.

[63] Surah 2:A1-Baqarah: 256.

[64] Hassan, "Religious Human Rights and the Qur'an", p. 91.

final religion and that turning from this true religion to another which is, by definition, "false" cannot be tolerated. Since salvation is the most important objective for a human being, all attempts should be made, in their view, to keep the person within the fold of Islam, the only path to salvation.[65]

According to Abdullah Saeed, while there is general consensus that coercion should not be used to convert someone to any religion, including Islam, the right of religious freedom is not extended to a Muslim who wants to change his or her religion to another. Significantly, pre-modern Islamic law states that coercion must be used to bring such a person back to Islam. If the person refuses, he or she should receive the ultimate penalty. However, this position is now being challenged by some Muslims.[66]

As expression of personal belief is concerned, Riffat Hassan notes that right to freedom includes the right to be free to tell the truth. The Qur'anic term for truth is "Haqq" which is also one of God's most important attributes. Standing up for the truth is a right and a responsibility which a Muslim may not disclaim even in the face of the greatest danger or difficulty.[67] While the Qur'an commands believers to testify to the truth, it also instructs society not to harm persons so testifying.[68][69]

2.5 Implications for Interpretation

The short overview of various secular and religious approaches to freedom of religion shows that it is not possible to talk about unified understanding of this concept. It is even not possible to agree on the starting points and key elements inside one "school of thought". This should not mean that we resign on any possibility of finding some common grounds. On the contrary, this plurality should encourage dialogue among the groups holding differing opinions.

The conception of freedom of religion that is adopted will lead to different interpretations of the scope and importance of the freedom. Thus while many people may agree that the concept of freedom of religion and belief is beneficial, their conceptions may be so divergent that the way in which they envisage religious freedom working in practice will differ significantly. If freedom of religion is important because everyone has different and wholly subjective religious ideas, for example, then beliefs about religion may be no more significant then beliefs about the best flavour of ice-cream, so little reason may be needed to justify state interference. If religious freedom is important only to limit social conflict then constraints on the freedom that do not cause conflict may be acceptable. If questions about religion and belief are, however, perceived as an essential component

[65] Saeed and Saeed, *Freedom of Religion, Apostasy and Islam*, p. 16.
[66] Saeed and Saeed, *Freedom of Religion, Apostasy and Islam*, p. 19.
[67] Surah 4: An-Nisa': 135.
[68] Sura 2: Al-Baqarah: 282.
[69] Hassan, "Religious Human Rights and the Qur'an", p. 91.

of self-identity and if interference with them is seen to be an attack on the autonomy of the individual, then religious freedom is likely to be given a wide scope and limitations on it will require serious justification.[70]

As Carolyn Evans notes, in a religiously pluralistic Europe, the courts should be wary of drawing too heavily on religious models as a basis for freedom of religion or belief. While some individuals may respect religious freedom because of their religious beliefs, other may have to be forced to respect the freedom of others despite their religion or belief.[71]

These preliminary deliberations emphasize importance of prudent decisions of judicial (and quasi-judicial) bodies. As it is unfeasible to agree on a general understanding of the concept of religious freedom, the main responsibility rests with judicial bodies weighting various rights, interests and concerns being in stake in particular cases.

The following chapters try to elaborate on how various organs in the Council of Europe, the United Nations and the European Union have accomplished this role.

[70] Evans, *Freedom of Religion under the ECHR*, p. 32.

[71] Evans, *Freedom of Religion under the ECHR*, p. 28.

3 Freedom of Religion and the Council of Europe

3.1 European Convention for the Protection of Human Rights and Fundamental Freedoms

European Convention for the Protection of Human Rights and Fundamental Freedoms was opened for signature in 1950 and entered into force in 1953. The Convention has now been ratified by 47 European states.[1] The Convention was designed to give binding effect to some of the rights and freedoms set out in the United Nations' Universal Declaration of Human Rights. It was unprecedented in international law in three important respects. First, it empowered states to bring before an international tribunal other states alleged to have violated the rights of their own citizens. Second, it recognized individuals as subjects of international law by giving them the right to petition directly an international body with complaints directed against a state or states. Finally, it set up an enforcement mechanism to ensure that the contracting parties to the Convention respected their engagements.[2]
What importance has been given in the Convention to freedom of religion was accurately formulated by the Court in well-known case of *Kokkinakis v. Greece*:

> "[F]reedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it."[3]

There are four articles dealing directly with freedom of religion in the Convention. Article 9, Article 14, Article 2 of the First Protocol and Article 1 of Protocol No. 12. Article 9 (Freedom of thought, conscience and religion) reads as follows:

> (1) Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
>
> (2) Freedom to manifest one's religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society

[1] Updated information is accessible on http://conventions.coe.int/
[2] Willi Fuhrmann. "Perspectives on Religious Freedom from the Vantage Point of the European Court of Human Rights". English. In: *Birgham Young University Law Review* (2000). Pp. 829–840, p. 829.
[3] *Kokkinakis v. Greece,* app. no. 14307/88 (1993).

> in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

Article 14 — Prohibition of discrimination (concerning rights and freedoms stipulated by the Convention):

> The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 1 of the Protocol No. 12[4] enlarges scope of Article 14 and sets out general prohibition of discrimination:

> (1) The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
>
> (2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Article 2 of the First Protocol deals with right to education:

> No person shall be denied the right to education. In the exercise of any functions which it assumes in relation to education and to teaching, the State shall respect the right of parents to ensure such education and teaching in conformity with their own religious and philosophical convictions.

Some other articles could be used to protect certain aspects of freedom of religion or belief, although they do not refer directly to them: Article 8 (Right to respect for private and family life), Article 10 (Freedom of expression) and Article 11 (Freedom of assembly and association).

3.1.1 Admissibility

One of the important jobs of the Commission was to deal with the admissibility claims under the Convention. Among other rather technical issues the *question of standing* enjoys particular importance.
It is not entirely clear whether Article 9 rights are confined to natural persons. It appears that a distinction is drawn between "freedom of conscience" and "freedom of religion".

[4]The Protocol No. 12 was opened for signature in Rome on 4th November 2000, entered into force on 1st April 2005. As of 22nd March 2008 the total number of ratifications/accessions was 16 (total number of signatures not followed by ratifications was 21).

Because only individuals can have "thoughts" or "conscience", these freedoms cannot be relied on by corporations or associations.[5]

The Commission originally held that churches or religious organizations had no right to bring a claim under either Article 9 or Article 2 of the First Protocol. It were the adherents of the church who had a right to freedom of religion, not the churches themselves.[6] Later, however, the Commission revised its decision to refuse to grant standing to churches.[7] The Commission has also recognized that some churches may be non-governmental organizations and thus entitled to standing under Article 25. The Commission has also extended its ruling to "an association with religious and philosophical objectives".[8]

While the Commission has decided that the legal person of a church can have a standing to bring a freedom of religion case, freedom of conscience is not exercisable by a legal person. The Commission has consistently denied that a profit-making corporation could have any claim (either as to conscience or religion) under Article 9. In later cases, however, the Commission did not exclude the possibility that a profit-making organization that was established for purposes of exercising philosophical beliefs in community with others could have rights under Article 9(1).[9]

3.1.2 Interpretation of the Convention

The Court has accepted that Articles 31–33 of the Vienna Convention on the Law of Treaties[10] represent customary international law and that they are thus applicable to interpreting the Convention.[11] This means that the Court will interpret the words of the Convention in good faith, in light of its objects and purposes and that it will be prepared to use the *travaux prépraratoires* as a supplementary means of interpretation. Yet in some cases the Court can be seen to emphasize the importance of fulfilling the objects and purposes of the Convention, even if that at times requires a very broad approach to the meaning of the words themselves.[12] The Court has held that it should seek an

[5] Richard Clayton and Hugh Tomlinson. *The Law of Human Rights*. English. 1st ed. New York: Oxford University Press, 2000, p. 970.

[6] *Church of X v. the United Kingdom,* app. no. 3798/68 (1968). Evans, *Freedom of Religion under the ECHR*, p. 12.

[7] "[The] disctinction between the Church and its members under Article 9(1) is essentially artificial. When a church body lodges an application under the Convention, it does so in reality, on behalf of its members. It should therefore be accepted that a church body is capable of possessing and exercising the rights contained in Article 9(1) in ints own capacity as a representative of its members." *X. and the Church of Scientology v. Sweden,* app. no. 7805/77 (1979).

[8] *Omkarananda and the Divine Light Zentrum v. Switzerland,* app. no. 8118/77 (1981).

[9] Evans, *Freedom of Religion under the ECHR*, pp. 14–15.

[10] Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969, entered into force on 27 January 1980.

[11] *Golder v. the United Kingdom,* app. no. 4451/70 (1975).

[12] Evans, *Freedom of Religion under the ECHR*, pp. 51–52.

interpretation of articles that is most appropriate in order to realise the aim and achieve the object of the treaty, and not that which would restrict to the greatest possible degree the obligations undertaken by the parties.[13] It has also recognized the importance of applying the Convention in such a way as to ensure that the rights granted in it are "practical and effective" and not merely "theoretical and illusory".[14]

3.1.3 Article 9: What is Meant by "Religion or Belief"?

The first part of Article 9 protects the "right to freedom of thought, conscience and religion" without mentioning belief, but refers also to the right to change "religion or belief". The second part refers to the right of a person to "manifest his religion or belief, in worship, teaching, practice and observance", without mentioning thought or conscience. Thus "thought and conscience" must be distinct in some way from "religion or belief", as there is a non-derogable obligation to protect the right to freedom of thought and conscience, but there is no right to manifest them. [15]

The word "belief" is introduced in second part of Article 9(1). It seems to cover conveniently groups that have some religious elements but do not necessarily fall into the category of a religion (e.g. atheists or agnostics). Yet, if this is correct, the exclusion of belief from the first part of Article 9 seems to suggest that e.g. an atheist has the right to manifest his or her belief, but his or her right to hold this belief is not protected. Carolyn Evans suggests that probably the best way around this anomaly would be to assume that beliefs are a subset of the broader category of thought and conscience. The Court and Commission have worked under the assumption that there is a right both to have and to manifest beliefs without making their reasoning on this issue clear.[16]

The task of defining religion or belief in the context of Article 9 has generally been performed by the Commission.[17] The Commission has, however, not entered much into the controversy as it has rarely determined that something that is alleged to be a religion or belief is not.[18] The Court held in *Campbell and Cossans v. the United Kingdom* that a "conviction" under Article 2, Protocol 1 of the Convention is not synonymous with "opinion" or "ideas" as used in Article 10 but is rather akin to the term "beliefs" in Article 9. To amount to a conviction under Article 2 of Protocol 1, the belief in question had to attain a certain level of cogency, seriousness, cohesion and importance.[19] Under the pro-

[13] *Wemhoff v. Germany,* app. no. 2122/64(1968).

[14] *Artico v. Italy,* app. no. 6694/74 (1980).

[15] Evans, *Freedom of Religion under the ECHR*, p. 52. Malcolm D. Evans. *Religious Liberty and International Law in Europe*. English. Cambridge: Cambridge University Press, 1997, pp. 284–285.

[16] Evans, *Freedom of Religion under the ECHR*, p. 53.

[17] Evans, *Religious Liberty and International Law in Europe*, pp. 290–293.

[18] David Harris, Michael O'Boyle and Colin Warbrick. *The Law of the European Convention on Human Rights*. English. London: Butterworths, 1995, pp. 357–358. Cited according to Evans, *Freedom of Religion under the ECHR*, p. 54.

[19] Para. 36, *Campbell and Cossans v. the United Kingdom,* app. no. 7511/76 and 7743/76 (1982).

tection of Article 9 have fallen as religions or beliefs various Christian denominations,[20] Islam,[21] Hinduism,[22] Buddhism,[23] Judaism,[24] atheism[25] and even Druids[26] and Divine Light Zentrum.[27]

Whereas followers of well-known religions do not need to provide much information about what they believe in, the situation of adherents to "new faiths" or people having some kind of "special belief" has been more complicated. There were two cases in front of the Commission dealing with right to free exercise of religion in prison. Sadly, neither of applicants was able to provide sufficient information about existence of such religion. First one claimed to be a light worshipper,[28] second to be a member of the "Wicca" religion.[29] The Commission gave no indication of how many members a religion has to have, what length of time it has to have been in existence, how developed its rules need to be, or what other criteria it would consider relevant to the determination of whether or not a religion or belief exists. It is possible that the Commission was just concerned in the prison cases that prisoners might invent a religion or belief simply as a way of getting priviledges to which they would not otherwise be entitled. Such a fear of abuse, however, could be dealt with more directly and the State should be asked to show some reason to think that the person is using religious or other belief fraudulently.[30]

Further complication is that the term "belief" could include relatively individualistic beliefs that are not part of a structured religion or organization of believers. Many atheists fall into this category and the Court has explicitly recognized that the protection of the Convention extends to "free-thinkers", "atheists, agnostics, sceptics and the unconcerned".[31] From perspective of history of religion it is possible to note that majority of today indisputable religions (especially based upon revelation) started as some kind

[20] *Knudsen v. Norway,* app. no. 11045/84 (1985).

[21] *X. v. the United Kingdom,* app. no. 8160/78 (1981), *Karaduman v. Turkey* (1993).

[22] *ISKCON and others v. the United Kingdom,* app. no. 20490/92(1994).

[23] *X. v. the United Kingdom*, app. no. 5442/72 (1974).

[24] *D. v. France,* app. no. 10180/82 (1983).

[25] *Angeleni v. Sweden,* app. no. 10491/83 (1986).

[26] *A.R.M. Chappell v. the United Kingdom,* app. no. 10461/83 (1987).

[27] *Omkarananda and the Divine Light Zentrum v. Switzerland,* app. no. 8118/77 (1981).

[28] *X. v. the Federal Republic of Germany*, app. no. 4445/70 (1970).

[29] *X. v. the United Kingdom*, app. no. 7291/75 (1977). The applicant asked unsuccessfully his religious denomination to be entered into the prison record. The Commission stated "[i]t would seem, however, that the registration entitles the prisoner concerned to certain facilities for the manifesting of his religion. It is evident that such facilities are only conceivable if the religion to which the prisoner allegedly adheres is identifiable. The Commission observes that in the present case the applicant has not mentioned any facts making it possible to establish the existence of the Wicca religion." Such a statement might be quite surprising taking into consideration the reputation and number of followers of this neopagan religion.

[30] Evans, *Freedom of Religion under the ECHR*, pp. 58–59.

[31] *Kokkinakis v. Greece,* app. no. 14307/88 (1993); Evans, *Freedom of Religion under the ECHR*, p. 58.

of unstructured (or structures denying) movement of outcasts; and "religious structure" appeared in the times after the first generation when their personal experience needed to be passed on.[32]

It is disputable whether certain "political beliefs" such as Nazism[33] or communism[34] are to be considered as beliefs under Article 9, in contrast with e.g. politically or ethically motivated pacifism.[35][36]

This might be caused by the Commission that tended to look at the word "belief" in rather an abstract way and has not recognized that it is part of the phrase "religion or belief" in Article 9. Part of this conceptual confusion could be avoided, according to Carolyn Evans, if belief were to be given a more restricted meaning linked to it playing essentially the same role in the life of the individual as religion. She points out that attempt to treat all philosophies equally and fairly and reluctance to develop a theory of religious freedom resulted in Commission stretching the idea of belief so that there is an extra protection given to many ideas that would be better dealt with as simply thought or conscinece. Even the types of manifestation outlined in the second part of Article 9(1) suggest that belief is not intended to have a very general and broad scope, as the protected manifestations are connected to relatively traditional religious practices (particularly worship and observance). This leads the Commission into a dilemma when dealing with cases involving the meaning of freedom of religion or belief and the scope of the notion of manifestation. Having failed to use the definitional stage as a way of filtering out any but a very limited number of "beliefs", it is then necessary for it to define the rights under Article 9 narrowly in order to ensure that the scope of the Article does not become so wide that it is impracticable.[37]

As Carolyn Evans argues, it is indeed a pity that neither the Commission nor the Court were able to define (clearly) what definition of belief is and that this uncertainty results in inconsistency in the case law. On the other hand, the concepts of religion, faith and belief are highly controversial and should the Court or the Commission try to define them, even more serious harm might be caused to faith-based communities and individuals.

[32] It is basically birth of "tradition" in its latin meaning of *tradere* — to hand over, to hand down an account of an event but also to give up, surrender or betray.

[33] *X. v. Austria*, app. no. 1747/62 (1963).

[34] *Hazar, Hazar, Açik v. Turkey*, app. no. 16311/90, 16312/90, 16313/90 (1992).

[35] *Arrowsmith v. the United Kingdom,* app. no. 7050/75 (1978).

[36] Evans, *Freedom of Religion under the ECHR*, pp. 56–57.

[37] Evans, *Freedom of Religion under the ECHR*, pp. 65–66.

3.1.4 Defining "Religion and Belief" — Alternatives to the Viewpoint of the Court

Indeed, the Court has found itself in situation when it is quite impossible to find a criterion for drawing a borderline between what religion or belief is — and what is not.[38] What might help to deeper understanding of this dilematic state is short analysis of other approaches.
None of the United Nations or regional treaties give a definition of religion or belief and, while the *travaux préparatoires* of the various United Nations treaties do suggest a broad consensus on the inclusion of non-theistic beliefs in the term belief, they give little insight into what the terms mean beyond this. The application of these treaties by the relevant bodies has also tended toward broad and inclusive definitions that lack precision[39] and needs to be defined by case-law.[40]

Domestic courts have been forced to be a little more precise then international bodies, although they too have been wary of developing an unduly restrictive or conservative definition of religion or belief. The Supreme Court of the United States has excluded beliefs with a "secular basis" or that are "philosophical and personal rather then religious" from the scope of the religion clauses of the First Amendment.[41] Compared to the European Court's emphasis on the coherence of a belief, the Supreme Court has expressly recognized that religious beliefs need not be "acceptable, logical, consistent or comprehensible" to qualify for protection under the First Amendment.[42]
In developing a positive definition, the Supreme Court drew on the works of theologians, particularly Paul Tillich, to hold that religious beliefs incorporate all sincere beliefs that occupy a parallel role to religion.[43] Tillich's work draws on the notion of "ultimate concern" as the touchstone of religious experience. Every person, by this test, has an ultimate concern that gives meaning and orientation to his or her life. Thus, to fall within the meaning of religion, it is necessary for a person to show that he or she has concern (i.e. a deep motivation) that is ultimate (i.e. fundamental and unable to be

[38] Similar situation mentions e.g. Z. Künh in case of drawing line between "justifiable discrimination" and "forbidden discrimination against". For more details see Zdeněk Kühn. "Diskriminace v teoretickém a srovnávacím kontextu". In: *Rovnost a diskriminace*. Czech. Ed. by Michal Bobek, Pavla Boučková and Zdeněk Kühn. 1st ed. Praha: C. H. Beck, 2007, pp. 37–42.

[39] See e.g. Human Rights Committee *General Comment 22, Article 18* which states that Article 18 [of the International Covenant on Civil and Political Rights] protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions.

[40] Evans, *Freedom of Religion under the ECHR*, pp. 60–61.

[41] *Wisconsin v. Yoder,* 380 U.S. 205 (1972).

[42] *Thomas v. Review of the Indiana Employment Security Division,* 450 U.S. 707 (1981).

[43] *United States v. Seeger,* 380 U.S. 163 (1965).

compromised).[44]

Such a test is very subjective, and many beliefs can suffice as long as they are "ultimate" for the believer. This may be an advantage as it can protect minority or new religions even if they would not meet "objective" standards designed by the "majority". Such a definition is also capable of including philosophical movements such as humanism or atheism which do not have traditional religious roots. However, its inclusiveness is also a weakness. It provides no principled way to distinguish between, for example, an "ultimate concern" with football and an "ultimate concern" with the tenets of Islam.[45]

Kent Greenawalt does not like courts using some kind of "dictionary" definition of religion. He suggests an analogical concept of religion. According to this approach, religion should be determined by the closeness of analogy in the relevant respects between the disputed instance and what is indisputably religion. A claimant for protection would have to show sufficient shared features with "indisputable religion" in a similar way that Wittgenstein showed that the term "games" had no common definition but rather a series of family resemblances.[46]

Something of a compromise between the content based definitions and those which suggest reasoning by analogy, was used in the Australian High Court in *The Church of the New Faith v. The Commission of Pay-roll Tax (Victoria).* The court held that no single characteristic is determinative, but that the following criteria were helpful in characterising beliefs as religious: a belief that reality extends beyond that which is capable of perception by the senses; that the ideas relate to man's nature and place in the universe and his relation to things supernatural; that the ideas are accepted by adherents as requiring or encouraging them to observe particular standards or codes of conduct, or to participate in specific practices having supernatural significance; that adherents constitute an identifiable group (even if loosely knit); and that adherents themselves see the ideas as religious.[47]

---

[44] Evans, *Freedom of Religion under the ECHR*, p. 63.

[45] Timothy Macklem. "Reason and Religion". In: *Faith in Law*. English. Ed. by Peter Oliver. Oxford: Hart Publishing, 2000. Cited according to Lucy Vickers. *Religion and Belief Discrimination in Employment — the EU law*. European Network of Legal Experts in the non-discrimination field, 2007. URL: `http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/07relbel_en.pdf` (visited on 27/04/2008), p. 26.

[46] "And the result of this examination is: we see a complicated network of similarities overlapping and cries-crossing: sometimes overall similarities." See aphorism 66 (and following). Ludwig Wittgenstein. *Philosophical Investigations*. English. 3rd ed. Oxford: Blackwell Publishers, 2001. URL: `http://www.galilean-library.org/pi7.html` (visited on 23/03/2008). Kent Greenawalt. "Religion as a Concept in Constitutional Law". In: *California Law Review* 72.5 (1984). Pp. 753–816, pp. 762–764. Evans, *Freedom of Religion under the ECHR*, p. 63.

[47] *The Church of the New Faith v. The Commission of Pay-roll Tax (Victoria),* High Court of Australia, 154 C. L. R. 120 (1982–1983). Vickers, *Religion and Belief Discrimination in Employment — the EU law*, p. 27. Evans, *Freedom of Religion under the ECHR*, p. 64.

3.1.5 *Forum Internum* and manifestation of religion or belief

According to the Court and in compliance with United Nations treaties, "Article 9 primarily protects the sphere of personal beliefs and religious creeds, i. e. the area which is sometimes called the *forum internum.* In addition, it protects acts which are intimately linked to these attitudes, such as acts of worship or devotion which are aspects of the practice of a religion or belief in a generally recognised form. In protecting this personal sphere, Article 9 does not always guarantee the right to behave in the public sphere in a way which is dictated by such a belief."[48] However, little consideration is given to what precisely does this entail. If it only entails the right to maintain one's internal beliefs, without any attempt to communicate them or act upon them, then there would be little difficulty in its application both because of its simplicity and the rarity of it being breached, since an applicant would have to show that external pressure sufficient to induce a forcible change in inner belief has been applied. In fact the approach adopted is somewhat broader and focuses upon the danger of indoctrination inherent in being obliged to act by the State in a way that runs counter to one's inner beliefs.[49]

The very case of State obliging to act in religious way contrary to one's personal belief occured in *Buscarini and Others v. San Marino.* The newly elected members of Grand General Council (the parliament of the Republic of San Marino) were required to take an oath on the Gospels, which meant (according to the Court) swearing allegiance to a particular religion on pain of forfeiting their parliamentary seats. The court held that such interference was contrary to Article 9 as it was not "necessary in a democratic society."[50] Carolyn Evans argues that this case should be an interference with *forum internum.* The Court just assumed that it was dealing with a case of manifestation of religion or belief and did not mention the issue of the basic freedom of religion itself. This was a good opportunity for elaborating a bit more the concept of *forum internum* and developing Court's jurisprudence relating to the first limb of Article 9.[51]

The crucial question is the point at which an action by the State is so intrusive that it is held to interfere, not merely with a person's right to manifest a religion but also with his or her right to have a religion or belief. The answer so far seems to be that States have to act very repressively before the Court or Commission will hold that they have interfered with the *forum internum.*[52]

While the Court and Commission have been relatively limited in holding that a State has interfered in the *forum internum* by forcing parcitipation in a non-religious programme,

---

[48] *C. v. the United Kingdom,* app. no. 10358/83 (1983). Para. 3, *Porter v. the United Kingdom,* app. no. 15814/02 (2003).

[49] Evans, *Freedom of Religion under the ECHR*, pp. 72–73. Evans, *Religious Liberty and International Law in Europe*, Chapter 1.

[50] *Buscarini and Others v. San Marino,* app. no. 24645/94 (1999).

[51] Evans, *Freedom of Religion under the ECHR*, pp. 73–74.

[52] Evans, *Freedom of Religion under the ECHR*, p. 78.

arguably different considerations should apply when the State is or appears to be involved in promoting a particular religious viewpoint. There are two primary contexts in which this could be said to occur: the first is in establishment of a State Church, the second is in education of children in State schools.[53] These two contexts are discussed in following subsections separately.

While there is no acknowledgement of this in the jurisprudence of the Court and Commission, the idea that beliefs and actions are separated and distinguishable notions is controversial. In the United States a similar division between belief and action (the first being inviolable and the second open to limitation) has become part of the orthodoxy of First Amendment case law.[54]

It is possible to say that acceptance of division between *forum internum* and *forum externum* is typical only for Western secular thinking. Majority of religions (including Judaism, Christianity and Islam) requires wholeness of life and does not diferentiate between religious and non-religious sphere. However, it very much depends on particular religious school or movement how is the religion lived out.

The second part of Article 9(1) provides for freedom, either alone or in community with others and in public or private, to manifest someone's religion or belief, in worship, teaching, practice and observance. The manifestation is subject to limitations of Article 9(2). We are now about to examine different aspects and forms of the manifestation.

3.1.5.1 Alone or in Community with Others, in Public or in Private

The right to manifest one's religion "in community with others" has always been regarded as an essential part of the freedom of religion and the two alternatives "either alone or in community with others" in Article 9(1) cannot be considered as mutually exclusive, or as leaving a choice to the authorities, but only as recognising that religion may be practised in either form. At the same time, however, the freedom of religion is not absolute but subject to the limitations of Article 9(2).[55]

While it is clear that individuals have a right to gather together for worship or religious ritual, the issue of whether the right to manifest a religion or belief in community with others also allows for the creation of organizations, institutions, or other permanent groups to promote the interest of the religion or belief is less clear. The Commission has decided that Article 9 does not give rise to a right to be formally recognized or registered as a religion in States that still distinguish between recongized and non-recognized religions.[56]

---

[53] Evans, *Freedom of Religion under the ECHR*, p. 79.

[54] Evans, *Freedom of Religion under the ECHR*, pp. 74–75.

[55] Para. 5, *X. v. the United Kingdom,* app. no. 8160/78 (1981).

[56] Evans, *Freedom of Religion under the ECHR*, p. 104. *X. v. Austria,* app. no. 8652/79 (1981).

3.1.5.2 Worship, Teaching, Practice and Observance

The Court and the Commission have not made it clear whether list of "worship, teaching, practice and observance" is to be considered as taxative or not. Anyhow, the list tends to be interpreted as exclusive and the Court and Commission have been reluctant to extend Article 9 to allow for the creation of "new rights" that are not explictly mentioned in the Convention. They rather focused on interpreting the four terms. Special attention was given to the concept of "practice" which is by itself very broad and has required interpretation. However, the term "practice" does not cover each act which is motivated or influenced by a religion or a a belief.[57]

"Worship" has been given the highest status of the manifestations listed in Article 9(1). The Court and Commission have not explicated the precise scope of the term and treat it together with "observance" as self-evident and not in need of definition. Conversely, the term "teaching" is not that clear by itself and for that reason does not have a common definition or understanding before the Court. It includes, subject to certain limitations, the freedom to attempt to convert others to one's belief. Thus it is often connected with (improper) proselytism.[58] An important issue is also transmitting teaching to younger generations, so it is connected to school education.[59] [60]

The leading case in interpretation of the term "practice" and its scope is *Arrowsmith v. the United Kingdom.* Pat Arrowsmith was convicted under sections 1 and 2 of the Incitement to Disaffection Act 1934, mainly on the ground that she had distributed leaflets to troops stationed at an army camp endeavouring to seduce them from their duty or allegiance in relation to service in Northern Ireland. She considered that her conviction and sentence interfered with her right to manifest her pacifist belief as guaranteed by Article 9(1) and her right to freedom of expression as guaranteed by Article 10.[61]

Pat Arrowsmith defined her pacifism as "the commitment, in both theory and practice, to the philosophy of securing one's political or other objectives without resort to the threat or use of force against another human being under any circumstances, even in response to the threat of or use of force." The Commission stated that such pacifism as a philosophy falls within the ambit of the right to freedom of thought and conscience. The attitude of pacifism may therefore be seen as a belief ("conviction") protected by Article 9(1). However, the distribution of the leaflets by the applicant was not considered to be

[57] *Arrowsmith v. the United Kingdom,* app. no. 7050/75 (1978). Evans, *Religious Liberty and International Law in Europe*, pp. 304–307. Evans, *Freedom of Religion under the ECHR*, pp. 105–106.

[58] Question of proselytism is further elaborated in subsection 3.1.6 Freedom to Change Religion and Proselytism.

[59] *Kokkinakis v. Greece,* app. no. 14307/88 (1993); Evans, *Freedom of Religion under the ECHR*, pp. 107–110; Clayton and Tomlinson, *The Law of Human Rights*, pp. 972–973.

[60] Freedom of religion in relation to right to education is further elaborated in subsection 3.1.9 Freedom of Religion and Belief in Education.

[61] *Arrowsmith v. the United Kingdom,* app. no. 7050/75 (1978).

protected by Article 9(1) as manifestation of her pacifist belief, because, according to the Commission the leaflets did not express pacifist views.[62]

The Commission held that not all actions which are motivated by religion or belief are covered by the protection in Article 9 but it did not set out any real test to determine which actions are covered. By excluding actions that are merely motivated or influenced by belief, the Commission suggested that a very direct link is needed between the belief and the action if the action is to be considered a "practice" under Article 9. This has come to be interpreted in later decisions of the Commission as a type of "necessity test" or "*Arrowsmith* test". Such an interpretation of *Arrowsmith* requires applicants to show that they were required to act in a certain way because of their religion or belief.[63]

The *Arrowsmith* test was devised as a way of defining and limiting the potentially open-ended term "practice". At times, however, the Commission has applied it also to "worship" under Article 9(1). The high-water mark in this line is the controversial decision of *X v. the United Kingdom* where the Commission suggested that no Article 9 issue was raised because the applicant had not shown that Friday prayer was required by his religion, i.e. Islam.[64]

The application of the *Arrowsmith* test by the Commission and Court has not been consistent and its scope is not entirely clear. It seems that it is generally restricted to questions of practice but that the Commission or Court have some discretion in whether to characterize an issue as one of practice or another form of manifestation such as teaching. It also appears that there are some cases that the Commission is prepared simply to assume must fall outside the protection of Article 9, even without applying the *Arrowsmith* or any other test to explain why this is so.[65]

The Court and Commission are not even very clear on what kind of evidence is necessary for proving that certain "practice" is required by applicant's religion. They usually do not accept subjective assessment of the applicants themselves, do not hear the evidence offered by them[66] and reference to expert evidence or publications of faith-based bodies[67] (authorities) happens rather on an ad hoc basis. It follows that this approach favours organized religions with clear decision-making authority and assumes that individual believers follow the teachings of the authorities.[68] It means that the approach of the Court and Commission does not respect and value pluralism inherent to religions and faiths present in Europe and builds upon rather simplified understanding of religious

[62] *Arrowsmith v. the United Kingdom,* app. no. 7050/75 (1978).

[63] *Arrowsmith v. the United Kingdom,* app. no. 7050/75 (1978); Evans, *Religious Liberty and International Law in Europe*, pp. 307–312; Evans, *Freedom of Religion under the ECHR*, p. 115.

[64] *X. v. the United Kingdom,* app. no. 8160/78 (1981); Evans, *Freedom of Religion under the ECHR*, p. 117.

[65] Evans, *Freedom of Religion under the ECHR*, pp. 117–119.

[66] See e.g. *X. v. the United Kingdom,* app. no. 8160/78 (1981).

[67] E.g. report by the World Council of Churches in *Kokkinakis v. Greece,* app. no. 14307/88 (1993).

[68] Evans, *Freedom of Religion under the ECHR*, pp. 120–123.

affairs, ending up in inconsitent case-law.

3.1.5.3 Limitations on Manifestations of Religion or Belief

Once it has been determined or assumed that an applicant's right to manifest a religion or belief under Article 9(1) has been restricted, it is necessary to determine whether this interference can be justified under Article 9(2). As to the case-law, Carolyn Evans notes that because of the limited scope given to Article 9(1), relatively few cases have been decided under Article 9(1), although it has come to greater prominence recently. In most of these cases, the Commission and Court have paid scant attention to Article 9(1) and either held with little explanation that there has been a breach of Article 9(1) or ignored the Article 9(1) issue altogether. Moving to a consideration of Article 9(2) with little or no discussion of Article 9(1) can lead the Court to pay undue attention to the arguments of the government about its justification for the law and its application, and to lose sight of the importance to the individual of the manifestation of religion in question.[69]
The drafting of the limitation clause for Article 9 was a controversial process and the drafters rejected the notion that all the rights in the Convention should be subject to the same limitations clause (as had been the case for the Universal Declaration). The final draft of Article 9(2) was the narrowest of the proposed Articles, so the right to manifest a religion or belief is subject to fewer limitations than the right to privacy (Article 8), freedom of expression (Article 10), and freedom of peaceful assembly and association (Article 11). The freedom to have or change a religion or belief is subject to no limitations at all. The Court and Commission, however, have tended to deal with Article 9(2) in a roughly similar way to the other limitations clauses and have interpreted its wording quite broadly.[70]

The limitations have to be "prescribed by law". According to the Court, there are two requirements flowing from this expression. Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able — if need be with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions

[69] Evans, *Freedom of Religion under the ECHR*, pp. 134–137.
[70] Evans, *Freedom of Religion under the ECHR*, p. 137.

of practice.[71]
A number of applicants in Article 9 cases have attempted to use the requirement that a restriction on freedom of religion or belief be "prescribed by law" to turn their particular case into a test case to challenge the validity of the law more generally. This has been the case in particular with broadly drafted laws that specifically target religious behaviour and under which numerous members of a particular religious minority have been targeted.[72] So far, however, no Article 9 case has succeeded and generally the Court has explicitly held that the legislation under which State action was taken was prescribed by law.[73]

If a restriction on religion or belief is prescribed by law, the Court or Commission then considers whether the law or manner in which it was applied is "necessary in a democratic society" for one of the reasons outlined in Article 9(2). In *Handyside v. the United Kingdom* the Court outlined the concept of necessity and developed the notion that States have a "margin of appreciation" in determining whether a particular restriction on a right is required in the given circumstance. This is because by reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them. The "margin of appreciation" is given both to the domestic legislator ("prescribed by law") and to the bodies, judicial amongst others, that are called upon to interpret and apply the laws in force.[74]
However, the margin of appreciation is not unlimited. The Court maintains its supervisory role. Carolyn Evans mentions some relevant factors to the width of the margin that have been identified by the Court and Commission: level of consensus on the issue among Contracting States, the extent to which the matter interferes with the core of an applicant's private life, the importance of the right to a democratic and pluralistic society, and the circumstances and background of the particular case.[75]

Any restriction placed on freedom to manifest a religion or belief must be necessary in a democratic society "in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others." Thus States cannot simply argue that their actions were necessary for the pursuit of any State interest, but have to show that the actions had a "legitimate aim". One of the key issues in determining whether a law has a legitimate aim is the extent to which the Court or

[71] Para. 49, *Sunday Times v. the United Kingdom,* app. no. 6538/74 (1979).
[72] Good examples are *Kokkinakis v. Greece,* app. no. 14307/88 (1993) and *Manoussakis and Others v. Greece,* app. no. 18748/91 (1996).
[73] Evans, *Freedom of Religion under the ECHR*, p. 139.
[74] Para. 48, *Handyside v. the United Kingdom,* app. no. 5493/72 (1976). Evans, *Freedom of Religion under the ECHR*, p. 142.
[75] Evans, *Freedom of Religion under the ECHR*, p. 143.

Commission is prepared to accept a State's assertions as to the aim of the legislation in question. It is necessary to note that the Court has been quite reluctant to test State's justifications as the State is likely to have a better understanding of why a law was passed and it does not want to accuse the State of bad faith and mendacity.[76]

"Interests of public safety" and "protection of public order" are usually taken together. It is quite important not to interpret these terms too widely (as to e.g. "public interest") for the States tend to intervene in religious practices at any time they become inconvenient or annoying to those in power. Proportionality requires a balancing of general public concerns with the rights that are at stake. Carolyn Evans comments that in a number of cases dealing with public order and safety limitations the Commission seemed more concerned to determine whether there was any justification for a State's claim of public policy then to weigh this against the restrictions of religious freedom. This seems to be changing into more restricted approach in the past years in cases such as *Buscarini v. San Marino* or *Serif v. Greece*.[77]

When it comes to the protection of the health of those who are not members of a religion, the issue is relatively simple and the need for the State to be able to invervene to protect third parties is clear. However, laws that seek to protect adult religious believers from risks that hey have choosen themselves raise more complex issues.[78] Quite a nice example of such dilemma might be case of *X. v. the United Kingdom* in which the applicant, a practising Sikh, was ordered to pay fines for failing to comply with a regulation requiring motorcyclists to wear a protective helmet. He alleged a violation of Article 9, arguing that, as his religion required him to wear a turban, it was not possible for him to wear a helmet. The Commission found that the obligation to wear a helmet was a necessary safety measure and that any resulting interference with the applicant's freedom of religion was justified for the protection of health by virtue of Article 9(2).[79] This approach was confirmed recently in a case dealing with Sikh who was forced to remove his turban at a security check on an airport.[80]

Other area that tends to be controversial in the health context is that of children who are endangered by their parents' religious beliefs. This endangerment may take the form of their parents refusing medical treatment, such as blood transfusion, on behalf of the child or using religious practices (such as prayer treatment) instead of standard medical treatment, or requiring the child to undergo a ritual that is physically hamrful, such as female genital mutilation. Given the lack of consensus on how to deal with such cases, and the fact that States that used their powers to overrule parents and permit hospitals to treat minors would be acting to protect the health of the child, it is likely that the

[76] Evans, *Freedom of Religion under the ECHR*, pp. 147–149.
[77] Evans, *Freedom of Religion under the ECHR*, pp. 149–155.
[78] Evans, *Freedom of Religion under the ECHR*, pp. 155–156.
[79] *X. v. the United Kingdom* app. no. 7992/77 (1978).
[80] *Phull v. France* app. no. 35753/03 (2005).

actions of the States would fall withing the margin of appreciation.[81]
As the protection of morals is concerned, the States are accorded a fairly generous margin of appreciation. This seems to be also outlook for the future, unless some evidence emerges of a general European standard in particular circumstances.[82] The cases rasing moral issues are often intertwined with the protection of the rights and freedoms of others, which are usually emphasized by the Court and Commission.[83]
The exercise of religious freedom gives rise to a range of potential conflicts with the rights and freedoms of others. This happens both while balancing different rights on the level of the Convention[84] — and under the scope of limitation mentioned in Article 9(2). Thus, this restriction functiones as something of a "catchall". As the Court has noted, in democratic societies, in which several religions coexist within one and the same population, it may be necessary to place restrictions on the freedom to manifest a religion or belief in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.[85]

Freedom of religion or belief might be also limited by Article 15 dealing with state of emergency:

> In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

While some articles in the Convention are non-derogable under Article 15, Article 9 is subject to it. The whole of Article 9, and not just the right to manifest a religion or belief, is covered by the derogation, although it is difficult to think of a situation that would "strictly require" a state to interfere in the *forum internum* of believers. Anyway, the Court has looked at states of emergency only a small number of times and no clear case law has been established.[86]

3.1.5.4 Religious Symbols in Public Sphere

There are two interesting cases dealing with wearing religious symbols in public. In both cases is the symbol in question Muslim headscarf, hijab. First case being *Dahlab*

[81] Evans, *Freedom of Religion under the ECHR*, pp. 157–158.
[82] Evans, *Religious Liberty and International Law in Europe*, p. 324.
[83] Evans, *Freedom of Religion under the ECHR*, p. 160.
[84] Sometimes it is suggested that the limitations clause may have a wider scope then the rights under the Convention. For details see Evans, *Freedom of Religion under the ECHR*, pp. 161–162 and Evans, *Religious Liberty and International Law in Europe*, p. 328.
[85] *Kokkinakis v. Greece,* app. no. 14307/88 (1993); Evans, *Religious Liberty and International Law in Europe*, p. 328. Evans, *Freedom of Religion under the ECHR*, pp. 160–161.
[86] Evans, *Freedom of Religion under the ECHR*, p. 165.

v. Switzerland, second *Leyla Şahin v. Turkey*. Lucia Dahlab, primary school teacher, was prohibited from wearing a headscarf in the performance of her teaching duties. She submitted that the measures taken against her infringed Article 9. The Court noted that the applicant, who abandoned the Catholic faith and converted to Islam in 1991, by which time she had already been teaching at the same primary school for more than a year, wore an Islamic headscarf for approximately three years, apparently without any action being taken by the head teacher or the district schools inspector or any comments being made by parents. That implies that during the period in question there were neither objections to the content or quality of the teaching provided by the applicant nor attempts to take advangate of manifestation of her belief.[87]

The Court accepted that it is very difficult to assess the impact that a powerful external symbol such as the wearing of a headscarf may have on the freedom of conscience and religion of very young children. The applicant's pupils were aged between four and eight, an age at which children wonder about many things and are also more easily influenced than older pupils. In those circumstances, it cannot be denied outright that the wearing of a headscarf might have some kind of proselytising effect, seeing that it appears to be imposed on women by a precept which is laid down in the Koran and which is hard to square with the principle of gender equality. It therefore appears difficult to reconcile the wearing of an Islamic headscarf with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society must convey to their pupils.[88]

Thus, it is not a surprise that the Court accordingly considered prohibiting the applicant from wearing a headscarf while teaching "necessary in a democratic society." However, what is quite unclear is the basis on which the Court based such assumptions and what might be then considered as religious symbol with proselytising effect. These questions should have been answered in *Leyla Şahin v. Turkey*, nontheless, they were addressed only in dissenting opinion of Françoise Tulkens.

Leyla Şahin was refused access to exams because she did not conform with a circular forbiding to wear Islamic headscarf at the university. She submitted that the ban on wearing the Islamic headscarf in institutions of higher education constituted an unjustified interference with her right to freedom of religion, in particular, her right to manifest her religion. The Court assumed that there was the interefence as stated without further investigation[89] (slight move forward in favour of applicants in comparison with former

[87] *Dahlab v. Switzerland,* app. no. 42393/98 (2001).

[88] *Dahlab v. Switzerland,* app. no. 42393/98 (2001).

[89] "The applicant said that, by wearing the headscarf, she was obeying a religious precept and thereby manifesting her desire to comply strictly with the duties imposed by the Islamic faith. Accordingly, her decision to wear the headscarf may be regarded as motivated or inspired by a religion or belief and, without deciding whether such decisions are in every case taken to fulfil a religious duty, the Court proceeds on the assumption that the regulations in issue, which placed restrictions of place and manner

decisions). The Court found that there was legal basis (although contested by the applicant) and the interference was prescribed by law. The legitimacy of the aim was not an issue between the parties.[90]

So the Court moved to examine whether the interference was necessary in a democratic society. The Court noted the emphasis placed in the Turkish constitutional system on the protection of the rights of women and gender equality and considered that, when examining the question of the Islamic headscarf in the Turkish context, there must be borne in mind the impact which wearing such a symbol, which is presented or perceived as a compulsory religious duty, may have on those who choose not to wear it. The issues at stake include the protection of the "rights and freedoms of others" and the "maintenance of public order" in a country in which the majority of the population, while professing a strong attachment to the rights of women and a secular way of life, adhere to the Islamic faith. Imposing limitations on freedom in this sphere may, therefore, be regarded as meeting a pressing social need by seeking to achieve those two legitimate aims, especially since this religious symbol has taken on political significance in Turkey in recent years. There are extremist political movements in Turkey which seek to impose on society as a whole their religious symbols and conception of a society founded on religious precepts. Thus, the States are allowed to take a stance against such political movements, based on its historical experience. The regulations were viewed as preserving pluralism in the university. [91]

The Court concluded that "having regard to the above background, it is the principle of secularism ... which is the paramount consideration underlying the ban on the wearing of religious symbols in universities. In such a context, where the values of pluralism, respect for the rights of others and, in particular, equality before the law of men and women are being taught and applied in practice, it is understandable that the relevant authorities should wish to preserve the secular nature of the institution concerned and so consider it contrary to such values to allow religious attire, including, as in the present case, the Islamic headscarf, to be worn." The Court found that the interference in issue was justified in principle and proportionate to the aim pursued and consequently there was no breach of Article 9.[92]

The decision of the Grand Chamber has been sixteen to one. It is quite interesting to read the dissenting opinion of judge Tulkens who discusses both principles underlying majority decision, secularism and (gender) equality. She opposes the threat posed by "extremist political movements" seeking to "impose on society as a whole their religious

---

on the right to wear the Islamic headscarf in universities, constituted an interference with the applicant's right to manifest her religion." Para. 78, *Leyla Şahin v. Turkey,* app. no. 44774/98 (2005).

[90]Para. 15–17, 70, 76–99, *Leyla Şahin v. Turkey,* app. no. 44774/98 (2005).

[91]Para. 115, *Leyla Şahin v. Turkey,* app. no. 44774/98 (2005). Partially based on *Refah Partisi (Welfare Party) v. Turkey,* app. no. 41340/98, 41342/98, 41343/98 and 41344/98 (2003).

[92]Para. 116, 122 and 123, *Leyla Şahin v. Turkey,* app. no. 44774/98 (2005).

symbols and conception of a society founded on religious precepts" on which the majority based justification of the regulations in issue "to preserve pluralism in the university". While everyone agrees on the need to prevent radical Islamism, a serious objection may nevertheless be made to such reasoning. Merely wearing the headscarf cannot be associated with fundamentalism and it is vital to distinguish between those who wear the headscarf and "extremists" who seek to impose the headscarf as they do other religious symbols. Not all women who wear the headscarf are fundamentalists and there is nothing to suggest that the applicant held fundamentalist views. She pointed out also ambivalent meaning of headscarf as a symbol, which the Court did not deal with.[93] According to her it is not even up to the Court to make scuh appraisals of a religion or religious practice. She concludes that if wearing the headscarf really was contrary to the principle of the equality of men and women in any event, the State would have a positive obligation to prohibit it in all places, whether public or private.[94]
Judge Tulkens elaborated also on the right to education in general:

> "By accepting the applicant's exclusion from the University in the name of secularism and equality, the majority have accepted her exclusion from precisely the type of liberated environment in which the true meaning of these values can take shape and develop. University affords practical access to knowledge that is free and independent of all authority. Experience of this kind is far more effective a means of raising awareness of the principles of secularism and equality than an obligation that is not assumed voluntarily, but imposed. A tolerance-based dialogue between religions and cultures is an education in itself, so it is ironic that young women should be deprived of that education on account of the headscarf. Advocating freedom and equality for women cannot mean depriving them of the chance to decide on their future. Bans and exclusions echo that very fundamentalism these measures are intended to combat. Here, as elsewhere, the risks are familiar: radicalisation of beliefs, silent exclusion, a return to religious schools. When rejected by the law of the land, young women are forced to take refuge in their own law. As we are all aware, intolerance breeds intolerance."[95]

[93]"As the German Constitutional Court noted in its judgment of 24 September 2003, wearing the headscarf has no single meaning; it is a practise that is engaged in for a variety of reasons. It does not necessarily symbolise the submission of women to men and there are those who maintain that, in certain cases, it can even be a means of emancipating women." Para. 11, Dissenting opinion of judge Tulkens, *Leyla Şahin v. Turkey,* app. no. 44774/98 (2005).
[94]Dissenting opinion of judge Tulkens, *Leyla Şahin v. Turkey,* app. no. 44774/98 (2005).
[95]Dissenting opinion of judge Tulkens, *Leyla Şahin v. Turkey,* app. no. 44774/98 (2005).

3.1.6 Freedom to Change Religion and Proselytism

Although quite many people are raised up by their families in a particular faith, it is not the only way of becoming follower of a particular religion. Irrespective of start of individual spiritual journey inside or outside religious community, the person's belief changes during the lifetime. It is quite necessary to provide sufficient space for a person to act accordingly to his belief. This is also provided for by Article 9 which includes freedom to change someone's religion or belief.

It might be noted that in many religious systems true living of a particular faith means living it out and talking to other people about the spiritual way found. This means walking on thin ice endangered by breaching freedoms of partner(s) in dialogue and commiting "improper proselytism". The Court dealt with this subject matter in famous case of *Kokkinakis v. Greece*.

The facts of the case are quite simple: Minos Kokkinakis, who was born into and Orthodox family, became Jehovah's Witness and since that time was subjected to several arrests and police harassments. On 2 March 1986 he and his wife called at the home of Mrs Kyriakaki in Sitia and engaged in a discussion with her. Mrs Kyriakaki's husband, who was the cantor at a local Orthodox church, informed the police, who arrested Mr and Mrs Kokkinakis and took them to the local police station.[96] Following the arrest, they were tried for proselytism. According to section 4 of Law no. 1363/1938

> [b]y "proselytism" is meant, in particular, any direct or indirect attempt to intrude on the religious beliefs of a person of a different religious persuasion (*eterodoxos*), with the aim of undermining those beliefs, either by any kind of inducement or promise of an inducement or moral support or material assistance, or by fraudulent means or by taking advantage of his inexperience, trust, need, low intellect or naïvety.[97]

Mr Kokkinakis criticised the absence of any description of the "objective substance" of the offence of proselytism. He thought this deliberate, as it would tend to make it possible for any kind of religious conversation or communication to be caught by the provision. He referred to the risk of "extendibility" by the police and often by the courts too of the vague terms of the section, such as "in particular" and "indirect attempt" to intrude on the religious beliefs of others. The Court has not accepted this argumentation and reiterated that "the wording of many statutes is not absolutely precise. The need to avoid excessive rigidity and to keep pace with changing circumstances means that many laws are inevitably couched in terms which, to a greater or lesser extent, are vague." Criminal-law provisions on proselytism fall within this category. The interpretation and application of such enactments depend on practice. In this instance there existed a body

[96] Para. 6 and 7, *Kokkinakis v. Greece,* app. no. 14307/88 (1993).

[97] Para. 16, *Kokkinakis v. Greece,* app. no. 14307/88 (1993).

of settled national case-law, which had been published and was accessible, supplemented the letter of section 4 and was such as to enable Mr Kokkinakis to regulate his conduct in the matter.[98]

Thus the Court held that the measure complained was "prescribed by law" within the meaning of Article 9(2) and also pursued legitimate aim (the latter without providing detailed reasoning).[99]

According to the Court, Article 9 includes in principle the right to try to convince one's neighbour, for example through "teaching", failing which, moreover, "freedom to change [one's] religion or belief", would be likely to remain a dead letter. However, a distinction has to be made between bearing Christian witness and improper proselytism. The former corresponds to true evangelism. The latter represents a corruption or deformation of it. It may take the form of activities offering material or social advantages with a view to gaining new members for a Church or exerting improper pressure on people in distress or in need; it may even entail the use of violence or brainwashing; more generally, it is not compatible with respect for the freedom of thought, conscience and religion of others. Scrutiny of section 4 of Law no. 1363/1938 showed that the relevant criteria adopted by the Greek legislature were reconcilable with the foregoing if and in so far as they were designed only to punish improper proselytism. However, the Greek courts established the applicant's liability by merely reproducing the wording of section 4 and did not sufficiently specify in what way the accused had attempted to convince his neighbour by improper means. There was missing justification of the applicant's conviction by a pressing social need and thus the contested measure was not proportionate to the legitimate aim pursued or, consequently, "necessary in a democratic society ... for the protection of the rights and freedoms of others". For that reason the Court found a breach of Article 9.[100]

From the (lack of) reasoning, weak and controversial argumentation it is quite understandable that the judgement was criticized also by the judges of the Court. There are five separate opinions.

Judge Pettiti stated that the Law in question contradicted Article 9 as, despite being forseeable, made it possible at any moment to punish the slightest attempt by anyone to convince a person he was addressing. Moreover, the expression "proselytism that is not respectable", which was a criterion used by the Greek courts when applying the Law, was sufficient for the enactment and the case-law applying it to be regarded as contrary to Article 9. Judge Pettiti contested also haziness of the definition of proselytism and too wide martin of interpretation for determining criminal penalties (so that the decisions are almost arbitrary). As the relation of freedom of religion and proselytims is concerned, he noted that:

[98]Para. 38 and 40, *Kokkinakis v. Greece,* app. no. 14307/88 (1993).

[99]Para. 41 and 44, *Kokkinakis v. Greece,* app. no. 14307/88 (1993).

[100]Para. 31, 48, 49 and 50, *Kokkinakis v. Greece,* app. no. 14307/88 (1993).

> Freedom of religion and conscience certainly entails accepting proselytism, even where it is "not respectable". Believers and agnostic philosophers have a right to expound their beliefs, to try to get other people to share them and even to try to convert those whom they are addressing. The only limits on the exercise of this right are those dictated by respect for the rights of others where there is an attempt to coerce the person into consenting or to use manipulative techniques. The other types of unacceptable behaviour — such as brainwashing, breaches of labour law, endangering of public health and incitement to immorality, which are found in the practices of certain pseudo-religious groups — must be punished in positive law as ordinary criminal offences. Proselytism cannot be forbidden under cover of punishing such activities.[101]

Judge Martens is of the opinion that whether or not somebody intends to change religion is no concern of the State's and, consequently, neither in principle should it be the State's concern if somebody attempts to induce another to change his religion. He continues that many religious faiths count teaching the faith (which is protected by Article 9) amongst the principal duties of believers. Admittedly, such teaching may gradually shade off into proselytising, which creates a possible "conflict" between two subjects of the right to freedom of religion. In principle, however, it is not within the province of the State to interfere in this "conflict" between proselytiser and proselytised. Firstly, because — since respect for human dignity and human freedom implies that the State is bound to accept that in principle everybody is capable of determining his fate in the way that he deems best — there is no general justification for the State to use its power "to protect" the proselytised. Secondly, because even the "public order" argument cannot justify use of coercive State power in a field where tolerance demands that "free argument and debate" should be decisive. And thirdly, because under the Convention all religions and beliefs should, as far as the State is concerned, be equal.[102]
On the other hand, according to judge Valticos freedom of religion "certainly means freedom to practise and manifest it, but not to attempt persistently to combat and alter the religion of others, to influence minds by active and often unreasonable propaganda.[103]

Kokkinakis v. Greece was further elaborated in respect of proselytism in *Larissis and Others v. Greece*, where officers in the army, who were members of Pentecostal church, were accused of proselytising their subordinates. The Court noted that

[101] Partly concurring opinion of judge Pettiti, Kokkinakis v. Greece, app. no. 14307/88 (1993).
[102] Para. 14 and 15, Partly dissenting opinion of judge Martens, Kokkinakis v. Greece, app. no. 14307/88 (1993).
[103] Dissenting opinion of judge Valticos, Kokkinakis v. Greece, app. no. 14307/88 (1993). It is worth to read this dissenting opinion as it argues almost militantly against any form of religious proselytism.

> the hierarchical structures which are a feature of life in the armed forces may colour every aspect of the relations between military personnel, making it difficult for a subordinate to rebuff the approaches of an individual of superior rank or to withdraw from a conversation initiated by him. Thus, what would in the civilian world be seen as an innocuous exchange of ideas which the recipient is free to accept or reject, may, within the confines of military life, be viewed as a form of harassment or the application of undue pressure in abuse of power. It must be emphasised that not every discussion about religion or other sensitive matters between individuals of unequal rank will fall within this category. Nonetheless, where the circumstances so require, States may be justified in taking special measures to protect the rights and freedoms of subordinate members of the armed forces.[104]

3.1.7 Conscientious objection

Although there is no automatic right to conscientious objection in the Convention, the state may in some circumstances be requiered to accommodate differences of conscience by exempting a person from the operation of a general law or requirement where she or he objects to it on the grounds of religion of beliefs.[105]

The issue has been raised in conjunction with religious education in schools and claims by parents that their children be exempt from attending religious lessons, practices or school events that are offensive to their religious convictions.[106] Widely disputed is also conscientious objection in relation to military service.[107]

Many Contracting Parties have some form of compulsory military service required of their young men by law. Historically, in some European States military service was expected of all able-bodied young men and no exemptions on the basis of conscience were permitted. Nowadays, however, most European compulsory military service systems also permit conscientious objectors (variously defined) to perform substitute civilian service if they are opposed to armed service. Generally a refusal to undertake either military or alternative service leads to a variety of punishments, which can include imprisonment. Until very recently conscientious objectors have had little assistance from the Convention.[108]

The question of conscientious objection has not been considered directly under Article 9 yet. The famous *Thlimmenos v. Greece* has been decided on the basis of Article 14 in conjuction of Article 9.[109] For that reason it is awaited Court's decision in case of

[104] Para. 51, *Larissis and Others v. Greece,* app. no. 23372/94, 26377/94 and 26378/94 (1998).

[105] Clayton and Tomlinson, *The Law of Human Rights*, p. 979.

[106] For more detailed analysis see subsection 3.1.9 Freedom of Religion and Belief in Education.

[107] Clayton and Tomlinson, *The Law of Human Rights*, p. 979.

[108] Evans, *Freedom of Religion under the ECHR*, p. 170.

[109] Iakovos Thlimmenos, Jehovah's Witness, was not appointed a chartered accountant as a result of

Bayatayan v. Armenia that was hold admissible for examination under Article 9.[110]

3.1.8 Freedom of Religion and State Church

Although churches and States in Europe are less intertwined nowadays in comparison with the past, still there are number of State churches or majority churches with special status.[111] None of these States has official policy of persecution or intolerance of other religion. Most, however, give certain privileges or comparative benefits to a particular church (or churches) *vis-à-vis* other religions or churches.[112] The Court held concerning the State church the following:

> A State Church system cannot in itself be considered to violate Article 9 of the Convention. In fact, such a system exists in several Contracting States and existed there when the Convention was drafted and when they became parties to it. However, a State Church system must, in order to safisfy Article 9, include specific safeguards for the individual's freedom of religion.[113]

One of the major areas of interconnectedness between State and State church(es) is the economic area. The State may collect church taxes directly for an established church (or for any other church) from people who are members of that church. The Commission has also permitted a State to require a non-believer to pay the proportion of taxes to a State church that is required for the Church to carry out its "secular functions". For all of these purposes the State can require people to notify it of a change of religion — arguably an interference in the right not to be compelled to reveal one's religion. The State may also authorize churches to require direct payments of church taxes and permit the churches to use the judicial machinery of the State to enforce the payments. In assessing cases related to taxation, the Commission has sometimes equated membership of a church with members of a private organization and has not given consideration to the fact that consequently the individuals might be required to reveal their religious

---

his past conviction for insubordination consisting in his refusal to wear the military uniform. The Court agreed with the Greek government that persons who refuse to serve their country must be appropriately punished. However, noted that the applicant did serve a prison sentence for his refusal to wear the military uniform. Thus imposing a further sanction on him would be disproportionate. It followed that the applicant's exclusion from the profession of chartered accountants had not pursued a legitimate aim. As a result, the Court found that there existed no objective and reasonable justification for not treating the applicant differently from other persons convicted of a serious crime. *Thlimmenos v. Greece,* app. no. 34369/97 (2000).

[110] *Bayatayan v. Armenia,* app. no. 23459/03.

[111] General overview of the church and State relations in the old 15 members of the European Union can be found in Gerhard Robbers, ed. *State and Church in the European Union.* English. Baden-Baden: Nomos, 1996.

[112] Evans, *Freedom of Religion under the ECHR*, p. 80.

[113] Annex to the decision of the Court in *Darby v. Sweden,* app. no. 11581/85 (1990); cited according to Evans, *Freedom of Religion under the ECHR*, p. 80.

affiliation. That may inhibit some persons from freely exercising their choice and may thus act as a constraint on the *forum internum*.[114]

According to the Commission, the State may arrange the taxes in a way that provides more benefits to one church over another. In *Iglesia Bautista "El Salvador" and Ortega Moratilla v. Spain,* a protestant church claimed the same exemption from property tax as was granted to the Catholic Church in a Concordate. There was, however, no infringement of Article 9, either alone or in conjuction with Article 14 as the Commission found "objective and reasonable justification" for the difference in treatment in the very fact of the agreement between Spain and Holy See, which placed reciprocal obligations on the two parties. As there was no comparable arrangement between the Baptist church and the State, there was no discrimination in allowing tax exemption only to Catholic Church. Finally, the Commission dissmissed the argument that exemption only for one church was form of indirect contribution (subsidy) to the church as obligation to pay taxes is a general and neutral one.[115] Carolyn Evans notes that the decision was presumably influenced by the fact that if all religions had to be given the same privileges as the State church, the whole notion of State church would be undermined.[116] The argumentation of the Commission in this case is, anyway, a weak one.

Connected with taxation and redistribution of taxes are issues of power exercised by the State in the State church or churches dependent on such redistribution. The Commission found legitimate for the State to set out conditions for employment and limit religious freedom of (some) civil servants[117] which could be otherwise considered as interference with the the autonomy of church and violation of religious freedom.

On the other hand, State church requires also State actions and State responsibility under the Convention for some of the actions of the church. The State has the ability, at least in some circumstances, to require a minister either to behave in a certain way or to resign. The freedom of religion of ministers in established churches is, thus, quite limited. The State could not force the minister to remain a member of the church or the ministry but it could regulate minister's behaviour, even in areas of theological opinion and conscience.[118][119]

In comparison with State churches, regulation of non-State religious groups is far more limited. Despite the State attempts to treat these religious groups in the same way as it treats the State church. An exemplary case being *Serif v. Greece* in which Greek government prosecuted Serif for behaving as a Mufti of Rodopi. The problem was that he

[114] Evans, *Freedom of Religion under the ECHR*, pp. 81–82.

[115] *Iglesia Bautista "El Salvador" and Ortega Moratilla v. Spain,* app. no. 17522/90 (1992).

[116] Evans, *Freedom of Religion under the ECHR*, p. 84.

[117] *X. v. Denmark,* app. no. 7374/76 (1976).

[118] See e.g. *X. v. Denmark,* app. no. 7374/76 (1976) where Danish minister was not given freedom of tailoring catechesis (preaparation for baptism) for a particular person and had to follow instructions of Church Ministry preaching right to baptism without attending religous lessons.

[119] Evans, *Freedom of Religion under the ECHR*, pp. 84–86.

was elected by the Muslims attending Friday prayer after another person was elected and appointed by the government. Greek government justified its intervention by claiming to protect the public order (some acts of muftis are recognized by the civil law[120]) and the communities from tensions. However, in the Court's view, punishing a person for merely acting as the religious leader of a group that willingly followed him can hardly be considered compatible with the demands of religious pluralism in a democratic society. Moreover, the Court does not consider that, in democratic societies, the State needs to take measures to ensure that religious communities remain or are brought under a unified leadership. And although the Court recognises that it is possible that tension is created in situations where a religious or any other community becomes divided, it considers that this is one of the unavoidable consequences of pluralism. The role of the authorities in such circumstances is not to remove the cause of tension by eliminating pluralism, but to ensure that the competing groups tolerate each other.[121] Nevertheless, it is necessary to note that the Court evaded controversies inherent to the case by elaborating on moral leadership of the Mufti as there was no proof of Serif exercising any acts with civil law implications or causing any (violent) tensions in the community or among the communities.

As Carolyn Evans points out, the issue of the extent to which the establishment of a church may interfere in the *forum internum* of both members and non-members of the church has rarely been considered and has only in the *Darby* case led the Commission to the conclusion that the State had gone too far in seeking to promote the iterests of its church. The historical importance of established religions in Europe seems to have made the Court reluctant to engage with the difficult philosophical questions that surround the extent to which such establishment might create an environment that interferes with the *forum internum* of both adherens and non-adherents of a particular religion.[122]

3.1.9 Freedom of Religion and Belief in Education

The drafters of the Convention were divided over how to protect the rights of parents over their children's religious and moral education. It was generally agreed that using a school for religious or moral indoctrination was abhorent and could become a tool of

[120] Article 11 of the Treaty of Peace of Athens between Greece and others provides: "In addition to their authority in purely religious matters and in the supervision of the management of *vacouf* property, the muftis shall have jurisdiction as between Muslims in the spheres of marriage, divorce, maintenance (*nefaca*), guardianship, administration, capacity of minors, Islamic wills and succession to the office of *mutevelli* (*Tevliét*).

Judgments delivered by the muftis shall be enforced by the competent Greek authorities.

As regards successions, any interested Muslim party may with prior agreement submit a dispute to the mufti as arbitrator. Unless the agreement expressly provides otherwise, all avenues of appeal to the Greek courts shall lie against an arbitral award."

[121] *Serif v. Greece,* app. no. 38178/97 (1999).

[122] Evans, *Freedom of Religion under the ECHR*, p. 87.

a totalitarian government. There were, however, concerns that any protection of their children should not involve expense of the State. Thus, while parents should be able to require the State not to teach their child in a particular way, they should not be able to demand that the State fund religious or moral education of a particular kind.[123]
The State can, however, choose to subsidize religious schools or pay for certain types of religious education (whether in State schools[124] or not) if it so desires. The concern of the drafters of the Convention was not to keep the State out of religion, but rather to ensure that the State was not subject to financial demands that it did not wish to meet.[125]

When faced with a school that wishes to teach a particular course and with parents who want the course either to be taught differently or not at all, or for their child to be excused from all or part of a course, the Court is faced with a difficult dilemma. There is a need to protect children from indoctrination and to protect the rights of parents to choose the religious and moral education of their children. The Court must also consider, however, the rights of a child to a full education and the practical difficulties caused to schools if too many exemptions are given from attending certain subjects. There is also the issue of whether society has a legitimate interest in seeing that all childern are given a good, general education that may include information about issues which are morally or religiously controversial.[126]
The Court addressed this dilemma in *Kjeldsen, Busk Madsen and Pedersen v. Denmark* which dealt with parents objecting to integrated, and hence compulsory, sex education introduced into State primary schools in Denmark. The Danish government contested applicability of the second sentence of Article 2 of Protocol No. 1 to State schools and emphasized that Denmark does not force parents to entrust their children to the State schools; it allows parents to educate their children, or to have them educated, at home and, above all, to send them to private institutions to which the State pays very substantial subsidies. The Court noted that the second sentence of Article 2 is binding upon the Contracting States in the exercise of each and every function and it must be read together with the first sentence which enshrines the right of everyone to education. It is on to this fundamental right that is grafted the right of parents to respect for their religious and philosophical convictions, and the first sentence does not distinguish, any more than the second, between State and private teaching. The second sentence of Article 2 aims at safeguarding the possibility of pluralism in education which

[123]Evans, *Freedom of Religion under the ECHR*, p. 88.
[124]Of the 46 Council of Europe member States which were examined, 43 provide religious education classes in state schools. In 25 of the 46 member States, religious education is a compulsory subject. However, the scope of this obligation varies depending on the State. Para. 30–31, *Hasan and Eylem Zengin v. Turkey,* app. no. 1448/04 (2007).
[125]Evans, *Freedom of Religion under the ECHR*, p. 89.
[126]Evans, *Freedom of Religion under the ECHR*, p. 90.

possibility is essential for the preservation of the "democratic society" as conceived by the Convention. In view of the power of the modern State, it is above all through State teaching that this aim must be realised.[127]

Danish government pleaded also that the second sentence of Article 2 implies solely the right for parents to have their children exempted from classes offering "religious instruction of a denominational character". According to the Court Article 2 applies to each of the State's functions in relation to education and to teaching and does not permit a distinction to be drawn between religious instruction and other subjects. It enjoins the State to respect parents' convictions, be they religious or philosophical, throughout the entire State education programme. The second sentence of Article 2 does not prevent States from imparting through teaching or education information or knowledge of a directly or indirectly religious or philosophical kind. It does not even permit parents to object to the integration of such teaching or education in the school curriculum, for otherwise all institutionalised teaching would run the risk of proving impracticable. In fact, it seems very difficult for many subjects taught at school not to have, to a greater or lesser extent, some philosophical complexion or implications. The same is true of religious affinities if one remembers the existence of religions forming a very broad dogmatic and moral entity which has or may have answers to every question of a philosophical, cosmological or moral nature. However, the State, in fulfilling the functions assumed by it in regard to education and teaching, must take care that information or knowledge included in the curriculum is conveyed in an objective,[128] critical and pluralistic manner. The State is forbidden to pursue an aim of indoctrination that might be considered as not respecting parents' religious and philosophical convictions.[129]

In *Campbell and Cossans v. the United Kingdom*, which is very much based upon argumentation of *Kjeldsen, Busk Madsen and Pedersen v. Denmark*, the Court addressed philosophical convictions of parents not agreeing with corporal punishment of their children in school. The Court took as philosophical convictions such convictions as are worthy of respect in a "democratic society" and are not incompatible with human dignity; in addition, they must not conflict with the fundamental right of the child to education. The Court noted that the right to education guaranteed by the first sentence of Article 2 by its very nature calls for regulation by the State, but such regulation must never injure the substance of the right nor conflict with other rights enshrined in the Convention or its Protocols. A condition of access to an educational establishment that conflicts with another right enshrined in Protocol No. 1 (such as return to school conditioned

[127]Para. 50, *Kjeldsen, Busk Madsen and Pedersen v. Denmark,* app. no. 5095/71, 5920/72 and 5926/72 (1976).

[128]It is highly disputable whether there is a possibility to present anything in an "objective manner", this being so especially in the area of philosphy and religon.

[129]Para. 51–53, *Kjeldsen, Busk Madsen and Pedersen v. Denmark,* app. no. 5095/71, 5920/72 and 5926/72 (1976).

by accepting corporal punishment which is contrary to parents' convictions) cannot be described as reasonable and in any event falls outside the State's power of regulation under Article 2.[130]

The Court also pointed out that the education of children is the whole process whereby, in any society, adults endeavour to transmit their beliefs, culture and other values to the young, whereas teaching or instruction refers in particular to the transmission of knowledge and to intellectual development. In relation to this the Court expressed that attempt to separate matters related to internal administration (allegedly corporal punishment) from "education" and "teaching" under Article 2 is quite artificial and not justifiable. The imposition of disciplinary penalties is an integral part of the process whereby a school seeks to achieve the object for which it was established, including the development and moulding of the character and mental powers of its pupils.[131]

Building on *Kjeldsen, Busk Madsen and Pedersen v. Denmark* is also Commission decision in *Angeleni v. Sweden* which dealt with atheist applicants contesting not granting of exception from teaching of religious knowledge in Swedish school system. The Commission found complaint of the parent incompatible *ratione personae* with the Article 2 of protocol No. 1 as it was read in conjuction with Swedish reservation providing that exeptions from religious clases could only be granted for children of another faith than the Swedish Church in respect of whom a satisfactory religious instruction had been arranged. The Commission noted that the organisation of the instruction of religious knowledge falls under Article 2 of the Protocol No. 1 (and thus Swedish reservation applies), however protection against religious indoctrination falls under Article 9 (and Swedish reservation does not apply).[132]

The Commission is of the opinion that Article 9 of the Convention affords protection against indoctrination of religion by the State, be it in education at school or in any other activity for which the State has assumed responsibility. As regards the contents of the instruction in religious knowledge the Swedish government submitted that the teaching in the subject religious knowledge aimed at being a teaching about religion, not in religion. In principle, teaching which provides information only cannot be regarded as being in conflict with the Convention or its Protocols. The Commission concluded that the mere fact of instruction in religious knowledge focusing on Christianity at junior level at school does not mean that the second applicant was under religious indoctrination in breach of Article 9.[133]

Carolyn Evans notes that *Angeleni v. Sweden* means shift from emphasis on "general and neutral" conveyance of information as a means of protecting against potential indoctrination to requiring the applicant to show actual indoctrination — which is a far

[130] Para. 36–41, *Campbell and Cossans v. the United Kingdom,* app. no. 7511/76 and 7743/76 (1982).
[131] Para. 33, *Campbell and Cossans v. the United Kingdom,* app. no. 7511/76 and 7743/76 (1982).
[132] *Angeleni v. Sweden,* app. no. 10491/83 (1986).
[133] *Angeleni v. Sweden,* app. no. 10491/83 (1986).

higher test for the applicant to meet. Moreover, it can be argued that the Commission has been less sympathetic to atheists/agnostics who claim the need to be exempted from religious instruction then to members of other religious faiths.[134]

In case of *Valsamis v. Greece* parents (Jehovah's Witnesses) claimed Article 2 of the Protocol No. 1 to be breached when their 12-year-old daughter was asked to take part in the celebration of the National Day on 28 October, when the outbreak of war between Greece and Fascist Italy on 28 October 1940 is commemorated with school and military parades. The girl refused to take part and was punished with one day's suspension from school. The refusal was based on pacifist conviction of Jehovah's Witnesses. The Court stated that it can discern nothing, either in the purpose of the parade or in the arrangements for it, which could offend the applicants' pacifist convictions to an extent prohibited by the second sentence of Article 2 (or Article 9). The obligation on the pupil does not deprive her parents of their right to enlighten and advise their children, to exercise with regard to their children natural parental functions as educators, or to guide their children on a path in line with the parents' own religious or philosophical convictions. And it is not for the Court to rule on the expediency of other educational methods which, in the applicants' view, would be better suited to the aim of perpetuating historical memory among the younger generation.[135]

Case dealing with education under Article 9, however not invoking Article 2 of Protocol No. 1, is *Saniewski v. Poland*. Bartosz Saniewski received a school report containig a list of courses that he had followed, including "religion/ethics", and marks obtained for his progress. The place reserved for "religion/ethics" contained no mark, but was left blank. Likewise, places reserved for certain other subjects such as "informatics", "music" and "fine arts" were left blank. The applicant asserted that his freedom of thought and conscience was breached since the absence of a mark for the course in religion revealed that he had not followed the course. He was obliged thereby to make a public statement as to his beliefs. The Court recalled the case-law of Commission which found that there was no interference with the rights safeguarded by Article 9 where voluntary religious education had been organised in State schools, or exemptions were possible from compulsory religious education, or when marks for attendance at such courses or alternative ethics courses were foreseen in school reports.[136] The Court concluded that as the applicant did not show suffering such consequences from the school report which could be said to amount to an interference with his rights and freedoms guaranteed by Article 9 of the Convention, the application is to be rejected as being manifestly ill-founded.[137]

---

[134] Evans, *Freedom of Religion under the ECHR*, pp. 94–95.

[135] *Valsamis v. Greece,* app. no. 21787/93 (1996).

[136] See *C.J., J.J. and E.J. v. Poland,* app. no. 23380/94 (1996) and *Angeleni v. Sweden,* app. no. 10491/83 (1986).

[137] Para. 1, *Saniewski v. Poland,* app. no. 40319/98 (2001).

Present Europe is characterized by higher percentage and participation of religious minorities connected with emphasis on intercultural and inter-religious dialogue. It is not of a great surprise then, that recently there were two controversial cases dealing with content and character of religious education in public schools. First being *Folgerø and Others v. Norway* and second *Hasan and Eylem Zengin v. Turkey.*

In *Folgerø and Others v. Norway* parents complained both under Article 9 and under the second sentence of Article 2 of Protocol No. 1 on account of the refusals by the domestic authorities to grant their children full exemption from the compulsory KRL subject dealing with Christianity, Religion and Philosophy taught during the ten-year compulsory schooling in Norway. The question to be determined was whether Norway, in fulfilling its functions in respect of education and teaching, had taken care that information or knowledge included in the Curriculum for the KRL subject was conveyed in an objective, critical and pluralistic manner or whether it had pursued an aim of indoctrination not respecting the applicant parents' religious and philosophical convictions and thereby had transgressed the limit implied by Article 2 of Protocol No. 1.[138]

The Norwegian Education Act 1998 laid emphasis on the transmission of knowledge about not only Christianity but also other world religions and philosophies. It moreover stressed the promotion of understanding and respect for, and the ability to maintain dialogue between, people with different perceptions of beliefs and convictions. It was to be an ordinary school subject that should normally bring together all pupils and should not be taught in a preaching manner. The different religions and philosophies were to be taught from the standpoint of their particular characteristics and the same pedagogical principles were to apply to the teaching of the different topics. From the drafting history it emerges that the idea was that the aim of avoiding sectarianism and fostering intercultural dialogue and understanding could be better achieved with an arrangement bringing pupils together within the framework of one joint subject rather than an arrangement based on full exemption and splitting pupils into sub-groups pursuing different topics. Moreover, it should be noted that the second sentence of Article 2 of Protocol No. 1 does not embody any right for parents that their child be kept ignorant about religion and philosophy in their education. That being so, the fact that knowledge about Christianity represented a greater part of the Curriculum for primary and lower secondary schools than knowledge about other religions and philosophies cannot, in the Court's opinion, of its own be viewed as a departure from the principles of pluralism and objectivity amounting to indoctrination. In view of the place occupied by Christianity in the national history and tradition of Norway, this must be regarded as falling within the State's margin of appreciation in planning and setting the curriculum.[139]

When seen together with the Christian object clause (according to which the object of

[138]Para. 53 and 85, *Folgerø and Others v. Norway,* app. no. 15472/02 (2007).

[139]Para. 89, *Folgerø and Others v. Norway,* app. no. 15472/02 (2007).

primary and lower secondary education was to give pupils a Christian and moral upbringing), the description of the contents and the aims of the KRL subject suggests that not only quantitative but even qualitative differences were to be applied to the teaching of Christianity as compared to that of other religions and philosophies. It is not clear then how promoting understanding, respect and the ability to maintain dialogue between people with different perceptions of beliefs and convictions, could be properly attained. In the Court's view, the differences were such that they could hardly be sufficiently attenuated by the requirement for the teaching to follow a uniform pedagogical approach in respect of the different religions and philosophies.[140]

The Court examined the system of partial exemption which pressuposed that the parents concerned be adequately informed of the details of the lesson plans to be able to identify and notify to the school in advance those parts of the teaching that would be incompatible with their own convictions and beliefs. The Court found that the system of partial exemption was capable of subjecting the parents concerned to a heavy burden with a risk of undue exposure of their private life and that the potential for conflict was likely to deter them from making such requests. In certain instances, notably with regard to activities of a religious character, the scope of a partial exemption might even be substantially reduced by differentiated teaching. This could hardly be considered consonant with the parents' right to respect for their convictions for the purposes of Article 2 of Protocol No. 1, as interpreted in the light of Articles 8 and 9 of the Convention. In this respect, it must be remembered that the Convention is designed to guarantee not rights that are theoretical or illusory but rights that are practical and effective.[141]

Notwithstanding the many laudable legislative purposes stated in connection with the introduction of the KRL subject in the ordinary primary and lower secondary schools, the Court concluded that Norway did not take sufficient care that information and knowledge included in the curriculum was conveyed in an objective, critical and pluralistic manner for the purposes of Article 2 of Protocol No. 1.[142] The Grand Chamber decided nine votes to eight that there was a violation of Article 2 which reflects how complex and controversial issues at stake are.[143]

In *Hasan and Eylem Zengin v. Turkey* the applicants came again from a religious minority, or better to say from a minority branch of Islam, Alevism. Ms Zengin, who was a pupil in a state school, was obliged to attend classes in "religious culture and ethics" from the fourth year of primary school. The Court had to determine, firstly, if the content-matter of this subject was taught in an objective, critical and pluralist manner. Secondly, it examined whether appropriate provisions have been introduced in

[140]Para. 90–95, *Folgerø and Others v. Norway,* app. no. 15472/02 (2007).

[141]Para. 97–100, *Folgerø and Others v. Norway,* app. no. 15472/02 (2007).

[142]Para. 102, *Folgerø and Others v. Norway,* app. no. 15472/02 (2007).

[143]For reading basically opposite reasoning in majority of case elements see joint dissenting opinion of judges Wildhaber, Lorenzen, Birsan, Kovler, Steiner, Borrego Borrego, Hajiyev and Jebens.

the Turkish educational system to ensure that parents' convictions to be respected.[144] According to the syllabus for "religious culture and ethics" classes, the subject was taught in compliance with respect for the principles of secularism and freedom of thought, religion and conscience, and was intended to "foster a culture of peace and a context of tolerance". It also aimed to transmit knowledge concerning all of the major religions. The syllabus and textbooks for teaching in primary schools and the first cycle of secondary school gave greater priority to knowledge of (Sunni) Islam in comparison with other religions and philosophies, but the extent did not amount to indoctrination, having regard to the fact that, (Sunni) Islam is the majority religion practiced in Turkey. However, the Court noted that religious diversity which prevails in Turkish society was not taken into account and Alevi faith was not represented (enough) in the syllabus and textbooks. For that particular reason the Court concluded that the school subject "religious culture and ethics" cannot be considered to meet the criteria of objectivity and pluralism and to respect the religious and philosophical convictions of Ms Zengin's father. As for the second question, Turkish law provided possibility to opt-out from religious clases (of Sunni Islam) only for Christians and Jews; followers of other faiths had to undertake special examination and disclose their religious affiliation. The Court did not consider the exemption procedure to be appropriate method providing sufficient protection to those parents who could legitimately consider that the subject taught is likely to give rise in their children to a conflict of allegiance between the school and their own values. Thus the Court unanimously held that there was a violation of Article 2 of Protocol No. 1. [145]

3.1.10 Freedom of Religion and Belief versus Freedom of Expression

Freedom of religion and freedom of expression are both fundamental freedoms upon which Western democracy is based. In deciding cases dealing with freedom of expression, the problem is usually not what is still to be considered as expression, but how to balance positive and negative consequences of such an expression,[146] especially as interference with religious freedom is concerned.

An early case dealing with conflict of freedom of religion and freedom of expression was brought forward by Church of Scientology and its members in 1970s. They felt insulted by "agitation" against them published in local Swedish newspaper. The "infamatory" statement was made by a professor of theology in the course of a lecture.[147] The Com-

[144] Para. 56–57, *Hasan and Eylem Zengin v. Turkey,* app. no. 1448/04 (2007).

[145] *Hasan and Eylem Zengin v. Turkey,* app. no. 1448/04 (2007).

[146] Petr Jäger and Pavel Molek. *Svoboda projevu. Demokracie, rovnost a svoboda slova.* Czech. 1st ed. Praha: Auditorium, 2007, p. 28.

[147] It included following passage: "Scientology is the most untruthful movement there is. It is the cholera of spiritual life. That is how dangerous it is." *Church of Scientology and 128 of its members v. Sweden,* app. no. 8282/78 (1980).

mission held that a particular creed or confession cannot derive from the concept of freedom of religion a right to be free from ctiticism. The Comission did not exclude the possibility of criticsm or "agitation" against a church or religious group unless it reaches such a level that it might endanger freedom of religion and tolerance of such behaviour by the authorities could engage State responsibility.[148]
In case of *Otto-Preminger-Institut v. Austria*[149] the Court reiterated[150] that

> "those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith. However, the manner in which religious beliefs and doctrines are opposed or denied is a matter which may engage the responsibility of the State, notably its responsibility to ensure the peaceful enjoyment of the right guaranteed under Article 9 (art. 9) to the holders of those beliefs and doctrines. Indeed, in extreme cases the effect of particular methods of opposing or denying religious beliefs can be such as to inhibit those who hold such beliefs from exercising their freedom to hold and express them. ... The respect for the religious feelings of believers as guaranteed in Article 9 (art. 9)[151] can legitimately be thought to have been violated by provocative portrayals of objects of religious veneration; and such portrayals can be regarded as malicious violation of the spirit of tolerance, which must also be a feature of democratic society."[152]

[148] *Church of Scientology and 128 of its members v. Sweden,* app. no. 8282/78 (1980).

[149] Otto-Preminger-Institut für audiovisuelle Mediengestaltung (OPI) announced a series of six showings, which would be accessible to the general public, of the film Das Liebeskonzil ("Council in Heaven") by Werner Schroeter (released in 1981). The film portrays the God of the Jewish religion, the Christian religion and the Islamic religion as an apparently senile old man prostrating himself before the Devil with whom he exchanges a deep kiss and calling the Devil his friend. He is also portrayed as swearing by the Devil. Other scenes show the Virgin Mary permitting an obscene story to be read to her and the manifestation of a degree of erotic tension between the Virgin Mary and the Devil. The adult Jesus Christ is portrayed as a low grade mental defective and in one scene is shown lasciviously attempting to fondle and kiss his mother's breasts, which she is shown as permitting. God, the Virgin Mary and Christ are shown in the film applauding the Devil. At the request of the Innsbruck diocese of the Roman Catholic Church, the public prosecutor instituted criminal proceedings against OPI's manager which ended in seizure and forfeiture of the film. *Otto-Preminger-Institut v. Austria,* app. no. 13470/87 (1994).

[150] *Church of Scientology and 128 of its members v. Sweden,* app. no. 8282/78 (1980). *Kokkinakis v. Greece,* app. no. 14307/88 (1993).

[151] Judges Palm, Pekkanen and Makarczyk oppose in their joint dissenting opinion that Convention could guarantee a right to protection of religious feelings. More particularly, such a right cannot be derived from the right to freedom of religion, which in effect includes a right to express views critical of the religious opinions of others.

[152] Para. 47, *Otto-Preminger-Institut v. Austria,* app. no. 13470/87 (1994).

Thus, the measures complained of by OPI were taken to protect the right of citizens not to be insulted in their religious feelings by the public expression of views of other persons and pursued a legitimate aim under Article 10 para. 2, namely "the protection of the rights of others." For whoever exercises the rights and freedoms enshrined in Article 10(1) undertakes an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any form of public debate capable of furthering progress in human affairs.[153] As a matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent improper attacks on objects of religious veneration, provided always that any "formality", "condition", "restriction" or "penalty" imposed be proportionate to the legitimate aim pursued.[154]

The Court also reiterated that in the case of "morals" it is not possible to discern throughout Europe a uniform conception of the significance of religion in society.[155] For that reason it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference.[156]

The *dicta* of *Otto-Preminger-Institut v. Austria* gave rise to a case in which the expanded notion of the right to religious respect was claimed as a positive right by two applicants. They argued that the State should have intervened to bring criminal charges angainst Polish magazine Wprost that published on its cover a picture of Black Madonna of Częstochowa (object of deep religious veneration in Poland for centuries) wearing a gas mask, in order to illustrate a cover story about growing air pollution. The Polish government investigated complaints made by people who were offended by the image but decided not to bring charges. The Commission dismissed the case as manifestly ill-founded and emphasized that the applicants were not inhibited from exercising their

[153] On the contrary, judges Palm, Pekkanen and Makarczyk states in their joint dissenting opinion that it should not be open to the authorities of the State to decide whether a particular statement is capable of "contributing to any form of public debate capable of furthering progress in human affairs"; for such a decision cannot but be tainted by the authorities' idea of "progress". Furthermore, if such interference is applied to protect the perceived interests of a powerful group in society, there is a danger that such prior restraint could be detrimental to that tolerance on which pluralist democracy depends. They propose that the duty and the responsibility of a person seeking to avail himself of his freedom of expression should be to limit, as far as he can reasonably be expected to, the offence that his statement may cause to others. Only if he fails to take necessary action, or if such action is shown to be insufficient, may the State step in.

[154] Para. 48–49, *Otto-Preminger-Institut v. Austria,* app. no. 13470/87 (1994). Para. 49, *Handyside v. the United Kingdom,* app. no. 5493/72 (1976).

[155] For details see *Müller and Others v. Switzerland,* app. no. 10737/84 (1988).

[156] Para. 50, *Otto-Preminger-Institut v. Austria,* app. no. 13470/87 (1994).

freedom to hold and express their belief.[157]

Similar case to *Otto-Preminger-Institut v. Austria* arose in British film industry: *Windgrove v. the United Kingdom.* Nigel Wingrove wrote the shooting script for, and directed the making of, a short movie (18 minutes) entitled Visions of Ecstasy. It depicts St Teresa of Avila, the sixteenth-century Carmelite nun, experiencing powerful ecstatic visions of her *psyché* and of Jesus Christ (mainly of sexual nature). Because of alleged infingement of criminal law of blasphemy, the British Board of Film Classification rejected issuance of classification certificate. The Court notes that, as stated by the Board, the aim of the interference was to protect against the treatment of a religious subject in such a manner "as to be calculated ... to outrage those who have an understanding of, sympathy towards and support for the Christian story and ethic, because of the contemptuous, reviling, insulting, scurrilous or ludicrous tone, style and spirit in which the subject is presented." The Court concludes that the refusal to grant a certificate for the distribution of the short film had a legitimate aim under Article 10(2). And the discriminatory nature of British law on blasphemy (protecting only Anglican Christianity), does not detract from the legitimacy of the aim pursued in that context.[158]

As for the (rarely used) laws on blasphemy, the Court stated that "there is as yet not sufficient common ground in the legal and social orders of the member States of the Council of Europe to conclude that a system whereby a State can impose restrictions on the propagation of material on the basis that it is blasphemous is, in itself, unnecessary in a democratic society and thus incompatible with the Convention."[159] The Court reiterated that in the field of morals the State has wide margin of appreciation,[160] however subject to final supervision of the Court. "Such supervision is all the more necessary given the breadth and open-endedness of the notion of blasphemy and the risks of arbitrary or excessive interferences with freedom of expression under the guise of action taken against allegedly blasphemous material."[161]

Dissenting judge Lohmus notes that in cases of prior restraint (censorship) there is interference by the authorities with freedom of expression even though the members of the society whose feelings they seek to protect have not called for such interference. The interference is based on the opinion of the authorities that they understand correctly the feelings they claim to protect. The actual opinion of believers remains unknown.[162]

---

[157] *Dubowska and Skup v. Poland,* app. no. 33490/96 and 34055/96 (1997). Evans, *Freedom of Religion under the ECHR*, p. 70.

[158] *Windgrove v. the United Kingdom,* app. no. 14719/90 (1996).

[159] Para. 57, *Windgrove v. the United Kingdom,* app. no. 14719/90 (1996).

[160] Judge Lohmus notes that in some cases, the margin of appreciation is applied is wide, in other cases it is more limited. However, it is difficult to ascertain what principles determine the scope of that margin of appreciation. See dissenting opinion of judge Lohmus, para. 6, *Windgrove v. the United Kingdom,* app. no. 14719/90 (1996).

[161] Para. 58, *Windgrove v. the United Kingdom,* app. no. 14719/90 (1996).

[162] Dissenting opinion of judge Lohmus, para. 3, *Windgrove v. the United Kingdom,* app. no. 14719/90

Building on the foregoing case-law is also recent case of *İ.A. v. Turkey* in which publisher of a book called "The forbidden phrases" was convicted of blasphemy. The Court took as common ground that the applicant's conviction constituted interference with his right to freedom of expression under Article 10(1). Furthermore, it was not disputed that the interference was prescribed by law and pursued the legitimate aims of preventing disorder and protecting morals and the rights of others, within the meaning of Article 10(2). The dispute related to the question whether the interference was "necessary in a democratic society." After reiterating the foregoing case-law the Court noted that the case concerned not only comments that offended or shocked, or a "provocative" opinion, but also an abusive attack on the Prophet of Islam. Notwithstanding the fact that there is a certain tolerance of criticism of religious doctrine within Turkish society, which is deeply attached to the principle of secularity, believers might have legitimately felt themselves to be the object of unwarranted and offensive attacks through the following passages: "Some of these words were, moreover, inspired in a surge of exultation, in Aisha's arms. ... God's messenger broke his fast through sexual intercourse, after dinner and before prayer. Muhammad did not forbid sexual intercourse with a dead person or a live animal."[163]

The Court therefore considered that the measure taken in respect of the statements in issue had been intended to provide protection against offensive attacks on matters regarded as sacred by Muslims. In that respect it found that the measure might reasonably be held to had met a "pressing social need". The authorities cannot be said to have overstepped their margin of appreciation in that respect and that the reasons given by the domestic courts to justify taking such a measure against the applicant were relevant and sufficient. As to the proportionality of the impugned measure, the Court was mindful of the fact that the domestic courts had not decided to seize the book, and accordingly considered that the insignificant fine imposed was proportionate to the aims pursued. Therefore, there has been no violation of Article 10 of the Convention.[164]

As C. Evans pointed out, the tendency of the Court is quite unfortunate in the aspect of tending to benefit majority religions or religious groupes that are prepared to respond to criticism or mockery with intolerance or outrage.[165] Whereas tolerant, moderate and peaceful religious groups would suffer in any case, either being treated as "fundamentalists" (especially by secular society) — or not true believers. Moreover, it might be quite difficult for minorities to invoke protection of their religious feelings in situation when the State (or regional government) cares only about not harming (historical) religious majority.

In recent years there have been many discussions, especially in the media, about scope

(1996).

[163]Para. 29, *İ.A. v. Turkey,* app. no. 42571/98 (2005).

[164]Para. 30–32, *İ.A. v. Turkey,* app. no. 42571/98 (2005).

[165]Evans, *Freedom of Religion under the ECHR*, p. 71.

of freedom of expression and its possible limitations. In the line of protecting freedom of speech, it is possible to quote Lord Justice Hoffmann in the case of *R v. Central Independent Television plc*:

> There are many emphatic statements about the importance of freedom of speech and the press. But they are often followed by a paragraph which begins with the word "nevertheless". The judge then goes on to explaing that there are other interests which have to be balanced against press freedom. ... But a freedom which is restricted to what judges think to be responsible or in the public interest is no freedom. Freedom means the rights to publish things which government and judges, however well motivated, think should not be published. It means the rights to say things which "right-thinking people" regard as dangerous or irresponsible. This freedom is subject only to clearly defined exceptions as laid down by common law...[166]

Some people feels that self-censorship (avoiding controversial religious topics) and political correctness are threats to democracy and want to "test" current situation of freedom of expression v. freedom of religion or belief. This reasoning can be found e.g. behind publishing 12 cartoons depicting the Prophet Muhammad in Danish newspaper *Morgenavisen Jyllands-Posten.*[167] As quite substantial part of Muslims forbids depicting of the Prophet, it was not unreasonable to predict disaproving reaction. This be the case especially when one of the pictures was interpreted as connecting the Prophet with terrorism. The most visible group protesting against portrayal of the Prophet were fundamentalists organizing violent demonstrations and riots (particularly in the Middle East). However, many Muslims objected to publishing the cartoons (and violent forms of fundamentalism) peacefully in the media, before administration and even before the courts.

---

[166] Clayton and Tomlinson, *The Law of Human Rights*, p. 1009.

[167] Kurt Westergaard, author of the 12 cartoons gave an interview two and half years after publishing them:

Guernica or a bomb in a turban, does everything really have to be said?

Yes, that's the way we do it here.

Even if you know it's offensive?

Offensive? That's something they'll just have to learn to live with. Politicians are insulted by cartoons every day. We live in a tolerant country and we can do that. Anyone who lives here must accept democracy the way we do it. In Europe, we didn't give in when the Nazis and fascists threatened us or when the communists were at the door. Another totalitarian force is attacking us now. Not the Muslims as a group, of course, but a handful of radicals. You don't give in to them. I am an atheist but I'm not anti-religion. Muslims as a group must realise that religion is a private matter.

Nanda Troost. "A totalitarian power threatens us in Europe". English. In: *de Volkskrant* (10th Mar. 2008). URL: `http://www.volkskrant.nl/binnenland/article511506.ece/A_totalitarian_power_threatens_us_in_Europe` (visited on 28/03/2008).

The case has not reached the Court in its merits (yet). One attempt was made by Maroccan citizen and NGOs, however was declared inadmissible because the Court considered that there was no jurisdictional link between any of the applicants and the relevant member State, namely Denmark.[168] It would have been interesting to observe the Court dealing with this matter under altered situation in the society since the last substantial decisions. Nevertheless it must be noted that the decision of the Director of Public Prosecutions on discontinueing criminal investigations against publisher was quite well-argumented and could be falling without great problems within the margin of appreciation.

Case based on the same grounds was brought by the Union of Islamic Organisations of France and the World Islamic League against Paris-based satirical weekly *Charlie Hebdo* for reprinting two of the Danish cartoons in 2006. However, Paris criminal court acquitted the editor, Philippe Val, and court of appeal uphold his acquittal in March 2008.[169]

On the top of the discussion about relation of freedom of religion and freedom of speech it is possible to question the whole situation when (religious) radicals and fundamentalists (of irrespective religious affiliation) manage to get into prime time and the media gives them great coverage because of violent and attracting expressions of their viewpoints that are not acceptable for the majority society. Whereas the persons who try to express themselves by publishing their critical opinions or provocative pieces of art are prevented from it in order not to harm religious feelings of the majority population.

3.2 Recommendations and Resolutions of the Parliamentary Assembly

Developments in the areas related to freedom or religion has been also on an agenda of the Parliamentary Assembly of the Council of Europe. For having a general overview it might be good to mention some of related PACE's recommendations and resolutions, although they are merely part of the Council of Europe's "soft power":[170]

- Recommendation 1178 (1992), of 5 February 1992, on Sects and new religious movements;

[168] *Ben El Mahi and Others v. Denmark,* app. no. 5853/06 (2006).

[169] "France: court confirms Charlie Hebdo editor's acquittal over Mohammed cartoons". English. In: *Reporters without Borders* (12th Mar. 2008). URL: `http://www.rsf.org/article.php3?id_article=26198` (visited on 25/03/2008).

[170] The term "soft powever" was explained by René van der Linden, the President of the PACE, speaking at the 3rd European Ecumenical Assembly in Sibiu (Romania) in September 2007. René van der Linden. "Speech during the Third European Ecumenical Assembly". English. In: (6th Sept. 2007). URL: `http://assembly.coe.int/Main.asp?link=http://assembly.coe.int/Communication/PresidentSpeeches/2007/20070906_Sibiu-Romania.htm` (visited on 01/05/2008)

- Recommendation 1202 (1993), of 2 February 1993, on Religious tolerance in a democratic society;
- Recommendation 1353 (1998), of 27 January 1198, on the Access of minorities to higher education;
- Recommendation 1396 (1999), of 27 January 1999, on Religion and democracy;
- Recommendation 1412 (1999), of 22 June 1999, on Illegal activities of sects;
- Recommendation 1720 (2005) of 4 october 2005, on Education and religion;
- Resolution 1510 (2006) of 28 June 2006, on Freedom of expression and respect for religious beliefs;
- Resolution 1535 (2007) of 25 January 2007, on Threats to the lives and freedom of expression of journalists;
- Recommendation 1805 (2007) of 29 June 2007, on Blasphemy, religious insults and hate speech against persons on grounds of their religion;
- Resolution 1605 (2008) and Recommendation 1831 (2008), of 15 April 2008, on European Muslim communities confronted with extremism.

3.3 The European Commission against Racism and Intolerance

The European Commission against Racism and Intolerance (ECRI) is the Council of Europe's monitoring body, combating racism, xenophobia, antisemitism and intolerance in greater Europe, from the perspective of the protection of human rights. ECRI's action covers all the measures needed to combat violence, discrimination and prejudice against persons or groups of persons on grounds of race, colour, language, religion, nationality or national or ethnic origin.
ECRI was established by the first Summit of Heads of State and Government of the member States of the Council of Europe. The decision is contained in the Vienna Declaration which the Summit adopted on 9 October 1993. On 13 June 2002 the Committee of Ministers granted ECRI its own Statute, thereby consolidating its role as an independent human rights monitoring body.
ECRI has been cooperating with other Council of Europe bodies in the area of religious freedom. Worth mentioning is e.g. cooperation with Directorate of Youth and Sport on study sessions, training courses and campaigns for young people in promoting religious tolerance.[171]

[171] Out of this cooperation was e.g. organized a seminar on "Islamophobia and its consequences on Young people" foollowed by a comprehensive report: Ingrid Ramberg. *Islamophobia and its consequences*

ECRI publishes regularly country reports and occasionaly examples of good practices. In its general policy recommendations it addressed also issues of antisemitism[172] and islamophobia.[173]

3.4 Conclusion

Freedom of religion and belief has been high on the agenda of the Council of Europe. This is closely connected with the assumption that religion plays an important role in maintaining democracy, protecting human rights, developing human resources and promoting active citizenship in civic society.

Key role in protecting freedom of religion and belief had adoption of the European Convention for the Protection of Human Rights and Fundamental Freedoms, establishing possibility of applying to the Commission and Court by individuals whose freedom was restricted and developing a system of case-law interpreting freedom of religion and belief stipulated in the Convention. This has not been, however, an easy process with holistic approach based on deep understanding of both religious and legal dimensions. The Court has failed to define clearly what is the content of the concept of freedom of religion and belief. It rather decided cases on ad hoc basis and quite often without proper detailed reasoning. The argumentation was not based on reports and studies of experts in the field of religion but rather on personal assumptions of the judges.

The Court and Commission might be accused of basing their judgements on Western Christian thinking higly influenced by secularism and division between *forum internum* and *forum externum*. This is quite recognizeable in approach to religions and faith-based groups that have not been traditionally present in Europe, and thus subjected to stricter examination by the Court. It is also possible to say that the Court has treated more favourably established and majority churches as it recognized that importance of their historical role should matter also in the present date.

The Court bases itself on principle of subsidiarity and constantly holds that some things are better dealt on the local or national level. Thus it grants quite wide margin of appreciation to the States. This being so especially when the matters in question differ from region to region and it is not possible to find a common stand. Such an approach values very much European pluralism and diversity. However, it may lead also to alibismus when the Court does not want to deal with a certain (cotroversial) question.

---

on Young People. Council of Europe, 2004. URL: `http://eycb.coe.int/eycbwwwroot/HRE/eng/documents/Islamophobia%20report/Islamophobia%20final%20ENG.pdf` (visited on 06/05/2008). Also various educational resources were published that are widely used in human rights education.

[172]Recommendation No. 1: Combating racism, xenophobia, antisemitism and intolerance, CRI(96)43. Recommendation No. 6: Combating the dissemination of racist, xenophobic and antisemitic material via the Internet, CRI(2001)1. Recommendation No. 9: The fight against antisemitism, CRI(2004)37.

[173]Recommendation No. 5: Combating intolerance and discrimination against Muslims, CRI(2000)21.

4 Freedom of Religion under the United Nations

This chapter aimes at giving a short overview of major instruments dealing with freedom of religion and belief under the auspices of the United Nations. It may shed also some light on the understanding and interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms because Article 9 of the Convention was drafted upon the text of Article 18 of the Universal Declaration of Human Rights.
Religion and freedom of religion are addressed by numerous conventions, declarations and other instruments. For maintaining character of a brief overview, this chapter focuses only on the Universal Declaration of Human Rights, International Covenant on Civil and Political Rights and Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. Finally impact of establishment of Human Rights Council on religious freedom is concisely evaluated.

4.1 Religious Freedom and the Universal Declaration of Human Rights

Article 18 of the UDHR provides:

> Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

The discussion that did take place over the Article 18 suggest that the substance of the right to religious freedom was far from straightforward. If the adoption of the text proved to be comparatively unproblematic, this reflected a willingness to compromise, rather than a common understanding of what was embraced by such a right.[1]
It is axiomatic that the UDHR was not intended as a source of legal obligation but was, as the Preable declares, proclaimed as "a common standard of achievement for all peoples and all anations". A lack of precision in a declaration which was setting rather then creating rights and imposing obligations meant that there was room for subsequent creative development. The question became more problematic, however, when Article 18 of the UDHR was taken as the model for Article 9 of the European Convention and, in consequence, has been interpreted and applied by the Strasbourg organs within a Western European context.[2]

[1] Evans, *Religious Liberty and International Law in Europe*, p. 183.
[2] Evans, *Religious Liberty and International Law in Europe*, p. 192.

4.2 Article 18 of the International Covenant on Civil and Political Rights

It was not until the Second Session of the Commission on Human Rights (CHR) in December 1947 that it was decided that the "international bill of rights" should comprise a declaration, a covenant and means of implementation. The Covenant was to provide both a source of legal obligation and define in detail the rights set out in the Declaration.[3] Although different in several respects from Article 18 of the UDHR, it cannot be said that the text and drafting history of the ICCPR article lends much by way of clarification. Both were intented to forge a consensus by avoiding the central point at issue: whether the freedom of religion included the freedom to change religion. For some of the Muslim States, the very idea that it might be legitimate to abandon Islam for another faith was an affront that could not be countenanced, whilst for others the freedom to change one's religion was so fundamental that the freedom of religion shorn of this attribute would not be a freedom worthy of legal recognition at all. The wording finally adopted might seem to anchor the article within comfortable proximity of the right to change one's religion. Yet precise wording to this effect was expressly excluded from the text and it was open to the interpretation that it allowed an individual to continue in a faith, to adopt a faith, but not abandon a faith already held. It has, however, become generally accepted that Article 18 does embrace the right to change religion, although the evidence advanced in support of this is not wholly convincing.[4]
General Comment e.g. states that freedom to "have or to adopt" a religion or belief necessarily entails the freedom to choose a religion or belief, including the right to replace one's current religion or belief with another or to adopt atheistic views, as well as the right to retain one's religion or belief.[5]

Article 18 of the ICCPR reads as follows:

> 1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
>
> 2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
>
> 3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety,

[3] Evans, *Religious Liberty and International Law in Europe*, p. 194.
[4] Evans, *Religious Liberty and International Law in Europe*, pp. 201–202.
[5] Para. 5, Human Rights Committee. *General Comment 22, Article 18*. United Nations, 1993. URL: `http://www1.umn.edu/humanrts/gencomm/hrcom22.htm` (visited on 21/03/2008).

> order, health, or morals or the fundamental rights and freedoms of others.
>
> 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Freedom of thought, conscience and religion is absolute and inviolable under the ICCPR because it is exempted from the scope of Article 4 which provides that in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States may take measures derogating from their obligations under the Covenant.

The Article 18 does not clearly distinguish among "religion", "belief" and related terms, thus causing interpretational problems which were partially transfered also into the European Convention. Moreover, answers to questions such as "what is religion or belief?", "what is a manifestation of a religion or belief?" and "what restrictions on the freedom of conscience, thought and religion are to be allowed?" are left surprisingly opaque.[6]

According to members of HRC, Article 18 deals with the right of the individual to freedom of thought and religion and does not deal with the freedom of churches or religious organizations with which religion could not be identified.[7]
Article 18 protects theistic, non-theistic and atheistic beliefs, as well as the right not to profess any religion or belief. The terms "belief" and "religion" are to be broadly construed. Article 18 is not limited in its application to traditional religions or to religions and beliefs with institutional characteristics or practices analogous to those of traditional religions. The Committee therefore views with concern any tendency to discriminate against any religion or belief for any reason, including the fact that they are newly established, or represent religious minorities that may be the subject of hostility on the part of a predominant religious community.[8]

As the term "coercion" is concerned, Malcolm Evans noted that the point at which persuasion becomes coercion is very much a matter of subjective assessment, as is the point at which restrictions placed upon the manifestation of a belief become coercive. However, coercion which "impairs" the freedom does embrace indirect as well as direct forms of pressure and so a fairly broad range of possibilities seems to be encompassed by the term. Malcolm Evans further notes that the article was being seen not as primarily concerned with the religious freedom of believers, but with maintaining order between those espousing different points of view within the framework of a liberal society.[9]

---

[6] Evans, *Religious Liberty and International Law in Europe*, p. 212.
[7] Evans, *Religious Liberty and International Law in Europe*, p. 213.
[8] Para. 2, Human Rights Committee, *General Comment 22, Article 18.*
[9] Evans, *Religious Liberty and International Law in Europe*, pp. 198, 206–207.

According to General Comment, Article 18(2) bars coercion that would impair the right to have or adopt a religion or belief, including the use of threat of physical force or penal sanctions to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as, for example, those restricting access to education, medical care, employment or the rights guaranteed by article 25 and other provisions of the Covenant, are similarly inconsistent with article 18(2). The same protection is enjoyed by holders of all beliefs of a non-religious nature. Moreover, in accordance with articles 18(2) and 17, no one can be compelled to reveal his thoughts or adherence to a religion or belief. And finally, the freedom from coercion to have or to adopt a religion or belief and the liberty of parents and guardians to ensure religious and moral education cannot be restricted.[10]

Whilst Article 18 grants to the individual the freedom to hold patterns of thought, conscience and religion, the right of manifestation is limited to religion or belief. Given that the concept of a religion or belief, for the purposes of the Covenant, remains unclear, it is not possible to consider in a meaningful fashion the question whether, and how, a distinction should be drawn between, on the one hand, "religion and belief" and, on the other, "thought and conscience", the manifestation of which would not be embraced by Article 18.[11]

The freedom to manifest religion or belief may be exercised "either individually or in community with others and in public or private". The freedom to manifest religion or belief in worship, observance, practice and teaching encompasses a broad range of acts. The concept of worship extends to ritual and ceremonial acts giving direct expression to belief, as well as various practices integral to such acts, including the building of places of worship, the use of ritual formulae and objects, the display of symbols, and the observance of holidays and days of rest. The observance and practice of religion or belief may include not only ceremonial acts but also such customs as the observance of dietary regulations, the wearing of distinctive clothing or headcoverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group. In addition, the practice and teaching of religion or belief includes acts integral to the conduct by religious groups of their basic affairs, such as the freedom to choose their religious leaders, priests and teachers, the freedom to establish seminaries or religious schools and the freedom to prepare and distribute religious texts or publications.[12] Malcolm Evans notes that worship, observance, practice and teaching provide and exhaustive catalogue and the interpretation placed upon the four heads limits their scope to acts closely and directly connected with the formal practice of religion rites

[10]Para. 3, 5 and 8, Human Rights Committee, *General Comment 22, Article 18.*

[11]Evans, *Religious Liberty and International Law in Europe*, p. 215.

[12]Para. 4, Human Rights Committee, *General Comment 22, Article 18.*

and customs. Thus, forms of behaviour and activites which flow from religious convictions are not seen as manifestations of belief.[13]

It is not very clear whether and to what extent is a right to conscientious objection covered by Article 18. It can be sustained only if considered to be a form of manifestation of religion or belief. Malcom Evans states that to the extent that the HRC has come to acknowledge the right to conscientious objection, this is of a *sui generis* nature and does not impact upon the broader issues under Article 18.[14]

In interpreting the scope of permissible limitation clauses, States parties should proceed from the need to protect the rights guaranteed under the Covenant. Limitations imposed must be established by law and must not be applied in a manner that would vitiate the rights guaranteed in article 18. Article 18(3) is to be strictly interpreted: restrictions are not allowed on grounds not specified there, even if they would be allowed as restrictions to other rights protected in the Covenant, such as national security. Limitations may be applied only for those purposes for which they were prescribed and must be directly related and proportionate to the specific need on which they are predicated. Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. The concept of morals derives from many social, philosophical and religious traditions; consequently, limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.[15] Moreover, general limitations of Article 20 ICCPR prohibit propaganda for war and advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.

Inclusion of sub-paragraph 4 of Article 18 is something of an anomaly. At both Fifth and Sixth Session the CHR rejected a number of proposals that concerned the right of parents to determine the nature of the religious teaching, if any, given to their children, principally on the grounds that the proper place for such a provision was in an article dealing with education. This was realized in Article 14(3) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), but during the Fifteenth Session of the Third Committee in 1960, Greece pressed to include the text of that article, in so far as it applied to religious and moral instruction, within the ICCPR in order to ensure that it would apply to those States which only became a party to the latter instrument.[16]

Although worded in a separate section, the freedom of parents to ensure that the religious education of their children is in accord with their own convictions can be seen as a specific form of manifestation.[17] The Committee is of the view that article 18(4) permits public

[13] Evans, *Religious Liberty and International Law in Europe*, p. 216.
[14] For more details see Evans, *Religious Liberty and International Law in Europe*, pp. 216–219.
[15] Para. 8, Human Rights Committee, *General Comment 22, Article 18.*
[16] Evans, *Religious Liberty and International Law in Europe*, pp. 200–201.
[17] Evans, *Religious Liberty and International Law in Europe*, p. 219.

school instruction in subjects such as the general history of religions and ethics if it is given in a neutral and objective way. The liberty of parents or legal guardians to ensure that their children receive a religious and moral education in conformity with their own convictions, set forth in article 18(4), is related to the guarantees of the freedom to teach a religion or belief stated in article 18(1). The Committee notes that public education that includes instruction in a particular religion or belief is inconsistent with article 18(4) unless provision is made for non-discriminatory exemptions or alternatives that would accommodate the wishes of parents and guardians.[18]

The ICCPR established in its Article 40 the Human Rights Committee (HRC) as a treaty-monitoring body with power to receive, examine and comment upon reports which States party to the ICCPR were obliged to submit and which set out their record of compliance with the obligatiosn assumed. States could also agree to the HRC considering communications concerning their record which had been submitted by other State Parties which had themselves accepted this procedure. Above all, and for those States which accepted it, the First Optional Protocol to the Covenant established a mechanism by which individuals claiming to be victims of a violations of the Covenant could submit a communication to the HRC.[19]

Unfortunately, the HRC's examination of State reports and its consideration of individual communications has shed little further light on the meaning to be accorded to Article 18. On the other hand, in 1993 the HRC adopted General Comment No. 22(48)[20] which provides an authoritative statement of heir understanding of the article. Throughout all its work, however, the HRC fails to distinguish adequately between the right to freedom of thought, conscience and religion and the question of discrimination on these grounds (Article 26).[21]

4.3 The 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief

The UN General Assembly, in reaction to a worldwide wave of anti-Semitic incidents, requested in 1962 in two parallel resolutions the drawing up of a declaration and convention on the elimination of all forms of racial discrimination and a declaration and convention on the elimination of all forms of religious intolerance. It is quite striking for political processes prevailing at the time that the two instruments on racial discrimination were already adopted by the United Nations in 1963 and in 1965 respectively, but that it lasted up till 1981 that the Declaration on religious intolerance was finally agreed upon. The convention on religious intolerance, though strongly propagated in earlier

[18] Para. 6, Human Rights Committee, *General Comment 22, Article 18.*
[19] Evans, *Religious Liberty and International Law in Europe*, p. 207.
[20] Human Rights Committee, *General Comment 22, Article 18.*
[21] Evans, *Religious Liberty and International Law in Europe*, pp. 207–208.

and later years by interested constituencies, never saw the light.[22] Quite many speakers during 25th Anniversary Commemoration of the adoption of the 1981 Declaration noted that given the complicated process of adopting the Declaration,[23] it would not be wise to invest time, money and energy into drafting and adopting a convention.[24]

The primary purpose of the Declaration and convention was to eliminate intolerance and discrimination. They were not inteded to promote religious freedom as such, and were aimed at intolerance and discrimination not only against but by the religious and the non-religious on account of ther beliefs. To that extent, they have more to do with the question of non-discrimination then with freedom of religion *per se* — and given that their origins lie alongside the Declaration and Convention on the Elimination of All Forms of Racial Discrimination, that is hardly surprising.[25]

Article 1 of the Declaration proclaimes the right to freedom of thought, conscience and religion being based upon the wording of Article 18 of ICCPR. Malcom Evans notes that inclusion of such wording was prompted by the inability of the CHR to agree upon a definition of the concepts it proclaimed. This being so even when Krishnaswami Study[26] was at their disposal. The problem with Article 18 of ICCPR is that it was supposed to be a source of legal obligation and not of definitions of (its) terminology.[27]

The text of the Declaration had potentially damaging impact upon the UDHR. The UDHR makes express mention of the rith to change one's religion or belief. The ICCPR adopted a compromise formula which was wilfully obscure on this point. All of the draft texts of Article 1 of the Declaration considered in the CHR had included the right to change religion, however, it was removed from the final wording. Thus, the Declaration became the weakest of the three instruments in this regard and twenty-four years of discussion surrounding them had resulted in the diminution of what for many had always been a key element of their conception of religious freedom.[28]

The Krishnaswami Study saw the freedom to manifest a religion or belief as having

[22] Theo van Boven. "Speech on the 25th Anniversary Commemoration in Prague on 25 November 2006 of the adoption of the 1981 Declaration on the elimination of intolerance and discrimination based on religion or belief". English. In: (25th Nov. 2006). URL: `http://www.tolerance95.cz/1981down/Afternoon_Speech-Theo_van_Boven.doc` (visited on 20/04/2008).

[23] For more details on the drafting process see e.g. Evans, *Religious Liberty and International Law in Europe*, pp. 227–231.

[24] For details check the speeches of participants in the 25th Anniversary Commemoration in Prague on 25 November 2006 of the adoption of the 1981 Declaration on the elimination of intolerance and discrimination based on religion or belief, on the conference website: http://www.tolerance95.cz/1981declaration/download.php.

[25] Evans, *Religious Liberty and International Law in Europe*, p. 230.

[26] Arcot Krishnaswami. *Study of Discrimination in the Matter of Religious Rights and Practices*. United Nations, 1960. URL: `http://www.religlaw.org/interdocs/docs/akstudy1960.htm` (visited on 20/04/2008).

[27] Evans, *Religious Liberty and International Law in Europe*, pp. 231–236.

[28] Evans, *Religious Liberty and International Law in Europe*, pp. 237–238.

two basic elements: the freedom to comply with what was prescribed or authorized by a religion or belief and the freedom from performing acts incompatible with the prescriptions of a religion or belief. The "freedom of action" included worship, processions, pilgrimages, the use of equipment and symbols, arrangements for disposal of the dead, observance of holidays and days of rest, diatary practices, the celebration of marriage and its dissolution by divorce, the dissemination or religion or belief and training of personnel. The "freedom from forced participation" included the taking of oaths, issues relating to military service, participation in religious or civic ceremonies, divulging secrets of the confessional and compulsory prevention or treatment of disease.[29]
The content of the right to freedom of thought, conscience and religion undertook a a long process of negotiations.[30] Final wording of Article 6 of the Declaration reads as follows:

> In accordance with Article I of the present Declaration, and subject to the provisions of Article 1, Paragraph 3, the right to freedom of thought, conscience, religion or belief shall include, inter alia, the following freedoms:
>
> a) To worship or assemble in connection with a religion or belief, and to establish and maintain places for these purposes;
>
> b) To establish and maintain appropriate charitable or humanitarian institutions;
>
> c) To make, acquire and use to an adequate extent the necessary articles and materials related to the rites or customs of a religion or belief;
>
> d) To write, issue and disseminate relevant publications in these areas;
>
> e) To teach a religion or belief in places suitable for these purposes;
>
> f) To solicit and receive voluntary financial and other contributions from individuals and institutions;
>
> g) To train, appoint, elect or designate by succession appropriate leaders called for by the requirements and standards of any religion or belief;
>
> h) To observe days of rest and to celebrate holidays and ceremonies in accordance with the precepts of one's religion or belief;
>
> i) To establish and maintain communications with individuals and communities in matters of religion and belief at the national and international levels.

[29] Krishnaswami, *Study of Discrimination in the Matter of Religious Rights and Practices*. Evans, *Religious Liberty and International Law in Europe*, p. 239.

[30] For details about process see Evans, *Religious Liberty and International Law in Europe*, pp. 239–245.

In 1983, the CHR and the Sub-Commission requested that a Special Rapporteur be appointed to prepare a report which would, *inter alia*, comment upon "the various manifestations of intolerance and discriminination on the grounds of religion or belief in the contemporary world and on specific rights violated, using the Declaration as a standard".[31] In 2000, the Commission on Human Rights decided to change the mandate title from "Special Rapporteur on religious intolerance" to "Special Rapporteur on freedom of religion or belief". United Nations Special Rapporteur on Freedom of Religion or Belief has been attached to the Commission on Human Rights and later to the Human Rights Council. This position has been carried out by Asma Jilani Jehangir since 2004.
Although the Reports are described as being concerned with the "implementation" of the Declaration, the Special Rapporteur is not an agent of enforcement. Rather, her role is to investigate, comment and advise upon the manner in which States adhere to the standards set out in the Declaration. Given the scope of the mandate and its relationship with the Declaration, it is not surprising that the work of the Special Rapporteur tends not to address directly questions such as the definition of religion or belief or of the legitimate scope of the freedom of manifestation.[32]

4.4 Recent Developments

The United Nations General Assembly established on 15 March 2006 the Human Rights Council (HCR), which replaced Commission on Human Rights (CHR). CHR was often criticized for the high-profile positions it gave to member states that did not guarantee the human rights of their own citizens. Even former UN Secretary General Kofi Annan commented that CHR "cast a shadow on the reputation of the United Nations system as a whole." It seems, hower, that the expectations of reform to bring higher standard of human rights protection has been rather illusionary.[33]
The problems begin with the HRC's composition. Only 25 of its 47 members are classified as "free democracies," according to Freedom House's ranking of civil liberties. Nine are classified as "not free." Four — China, Cuba, Russia and Saudi Arabia — are ranked as the "worst of the worst." These nations are responsible for repeated violations of the UN's own Universal Declaration of Human Rights. Yet it is they who dominate the council, leading a powerful bloc of predominantly Arab and African nations that consistently vote

[31] CHR Res. 1983/40 and Sub-Commission Res. 1983/31. Evans, *Religious Liberty and International Law in Europe*, p. 245.

[32] Evans, *Religious Liberty and International Law in Europe*, p. 247.

[33] Jackson Diehl. "A Shadow on the Human Rights Movement". English. In: *The Washington Post* (25th June 2007). URL: `http://www.washingtonpost.com/wp-dyn/content/article/2007/06/24/AR2007062401373.html` (visited on 19/04/2008). Warren Hoge. "Dismay Over New U.N. Human Rights Council". English. In: *New York Times* (11th Mar. 2007). URL: `http://www.nytimes.com/2007/03/11/world/11rights.html?ex=1331269200&en=3888d2c40656df4c&ei=5090&partner=rssuserland&emc=rss` (visited on 19/04/2008).

as a unit. These regimes have repeatedly used the Council as a powerful tool for shielding themselves from scrutiny and meting out criticism along stark political lines. According to Human Rights Watch, the council has turned a blind eye to at least 26 countries — the sites of some of the world's worst human-rights crises.[34] Although slightly more than half of the Human Rights Council's 47 members are free democracies, only a minority of these countries — about a dozen — have consistently voted in defense of the values and principles that the Council is supposed to promote. Unfortunately, too many democracies have thus far gone along with the spoilers, out of loyalty to regional groups and other political alliances.[35]

Organisation of the Islamic Conference (OIC) has pushed through two HRC resolutions – one at the Council's June 2006 inaugural session and another, with even worse language in March 2007. With the Council's adoption of the June 2006 resolution, the Islamic states succeeded in commissioning reports meant to support their position that the religion of Islam and its practitioners are singular victims in today's world.[36]

Human Rights Council's resolution of 30 March 2007 on Combating defamation of religions focused mainly on recent defamation of Islam (Muslims and Arabs), especially in connection to Danish Cartoons.[37] The resolution urged legal measures to protect religions rather then individual believers. It did not state that violence is an inappropriate response to offense.[38] It containts e.g. that the Human Rights Council

> *Emphasizes* that everyone has the right to freedom of expression, which should be exercised with responsibility and may therefore be subject to limita-

[34]Ronan Farrow. "The U.N.'s Human-Rights Sham". English. In: *Wall Street Journal* (29th Jan. 2008). A16. URL: `http://www.ngo-monitor.org/article.php?viewall=yes&id=1784` (visited on 19/04/2008).

[35]UN Watch. *Dawn of a New Era? Assessment of the United Nations Human Rights Council and its Year of Reform*. United Nations, 2007. URL: `http://www.unwatch.org/atf/cf/%7B6DEB65DA-BE5B-4CAE-8056-8BF0BEDF4D17%7D/DAWN_OF_A_NEW_ERA_HRC%20REPORT_FINAL.PDF` (visited on 19/04/2008), p. 1.

[36]Moreover, the UN High Commissioner for Human Rights, the Special Rapporteur on Racism, and the Special Rapporteur on Freedom of Religion were each charged with preparing reports on "incitement of religious hatred" and "defamation of religion." However, the joint report by the two rapporteurs discussed not only Islamophobia but also anti-Semitism and Christianophobia. In further defiance of the OIC's original design, the experts observed that international human rights law protects "primarily individuals in the exercise of their freedom of religion and not religions per se." They also noted that "criminalizing defamation of religion can be counterproductive." The High Commissioner's report included a reference to the incitement of hatred of non-Muslims in the Middle East. Consequently, while the March 2007 resolution "welcomed" the racism expert's report on "the situation of Muslims and Arabs in various parts of the world," it failed to even mention the joint report described above. Similarly, the OIC-dominated Council only "took note" of the High Commissioner's report, but did not "welcome" it, as is often the practice. UN Watch, *Dawn of a New Era?*, pp. 15–16.

[37]Danish Cartoons are dealt with in greater detail in 3.1.10 Freedom of Religion and Belief versus Freedom of Expression.

[38]UN Watch, *Dawn of a New Era?*, pp. 15–16.

tions as provided by law and necessary for respect of the rights or reputations of others, protection of national security or of public order, public health or morals and respect for religions and beliefs;

Deplores the use of the print, audio-visual and electronic media, including the Internet, and any other means to incite acts of violence, xenophobia or related intolerance and discrimination towards Islam or any other religion;[39]

4.5 Concluding remarks

The United Nations contributed to large extent to development of the concept of freedom of religion or belief and helped this freedom to be implemented and respected.
Two major weaknesses of the UN freedom of religion system are enforceability and politicization. The former stemming from the fact that the only binding document is ICCPR (and the implementing mechanism is not that effective), whereas e.g. Declaration 1981 lacks binding character at all. The latter being influenced by high representation in the UN bodies of States (regimes) infringing freedom of religion and not being interested in its implementation and enforcment, but rather disguising violations.

[39]Para. 10 and 11, A/HRC/4/9 Resolution of United Nations Human Rights Council on Combating defamation of religion (accessible at http://ap.ohchr.org/documents/E/HRC/resolutions/A-HRC-RES-4-9.doc).

5 Freedom of Religion and the European Union

5.1 Introduction

The initial Treaties for the European Coal and Steel Community (ECSC) as well as European Atomic Energy Community (Euratom) and the European Economic Community (EEC) did not contain any general human rights provisions. By the early 70s, although not mandated by the Treaties, the European Court of Justice (ECJ) informally established a competence for human rights issues within its case law by declaring human rights to be a general principle of Community law, which the Court saw itself obliged to ensure. To do so, the ECJ drew on the constitutional traditions common to all Member States as well as international human rights instruments ratified by all members, especially the ECHR.[1]

Still, the informal construction of human rights competence through case-law was not directly transferred into formal competencies. The first formal mentioning of human rights is to be found in the preamble of the Single European Act, which declared that the Community is "determined to work together to promote democracy on the basis of the fundamental rights recognized in the constitutions and laws of the Member States, in the Convention for the Protection of Human Rights and Fundamental Freedoms and the European Social Charter, notably freedom, equality and social justice."[2]

The Maastricht Treaty formally codified the standard set by ECJ case-law with the introduction of Article F (now Article 6) TEU, which confirmed that "[t]he Union shall respect fundamental rights, as guaranteed by the European Convention on Human Rights and Fundamental Freedoms ... and as they result from the constitutional traditions common to the Member States, as general principles of Community law."

The Amsterdam Treaty (1997), first, strengthened the wording of Article 6 by stating that the Union "is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." Second, in Article 46, it explicitly extended the powers of the Court of Justice to Article 6. The ECJ obtained the power to decide whether the institutions have failed to respect fundamental human rights. Third, in Article 7, the Amsterdam Treaty laid down a procedure for dealing with member states in breach of Article 6. The unanimous Council (minus the state in question) may, with the assent of the European Parliament, "determine the existence of a serious and persistent breach" and decide to suspend some of the state's rights including voting rights in the Council.[3]

[1] Frank Schimmelfennig and Guido Schwellnus. "The Constitutionalization of Human Rights in the European Union: Human Rights Case Studies and QCA Coding". English. In: (2004). URL: `http://www.eup.ethz.ch/research/constitutional/fs-gs-dossier.pdf` (visited on 23/04/2008), p. 1.

[2] Schimmelfennig and Schwellnus, "The Constitutionalization of Human Rights in the European Union: Human Rights Case Studies and QCA Coding", pp. 1–2.

[3] Schimmelfennig and Schwellnus, "The Constitutionalization of Human Rights in the European

The Treaty of Nice (2000) added a prior step to the sanctioning mechanism established at Amsterdam. In case the member states see a clear risk of a serious breach, they may address recommendations to the state and ask a group of independent experts for a report. The presidents of the European institutions (Council, Parliament, and Commission) also proclaimed a Charter of Fundamental Rights. The provisions of the Charter dealing with freedom of thought, conscience and religion as well as with cultural and religious diversity are further examined in this chapter.
The Charter itself was incorporated in Treaty establishing a Constitution for Europe. As the Constitution was rejected, it is not necessary to examine it *per se* in detail. The Constitution was, however, in slightly modified version adopted as Treaty of Lisbon and incorporated Charter into primary law. Aspects of Lisbon Treaty related to freedom of religion, churches, religious associations and communities are examined at the end of this chapter.
It is quite understandable that religion as such and freedom of religion and belief have not been much present in the primary law due to orientation on economic aspects of European integration in the (E)EC. This is also reflected in poor case law of ECJ dealing with religious affairs which is briefly introduced in this chapter. However, it is quite recognisable since 1990s that once economic integration is more or less accomplished, religion cannot be avoided. The necessity of addressing religion and treating religious communities as partners has been even more evident with immigrants coming from non-Christian and non-secularized backgrounds.
In 1990, Jacques Delors, the president of the European Commission at that time, appealed to a delegation of Protestant and Anglican church leaders to contribute to "the heart and the sould of Europe" as the EC should be moving from a "common market" to a real "community".This appeal has resulted in series of meetings with various faith-based bodies. Despite continuous raise of religion on the EU agenda, probably the most important "infiltration" of religion into the European law happened through anti-discrimination law.

5.2 Charter of Fundamental Rights of the European Union

The Charter of Fundamental Rights of the European Union is a document containing human rights provisions, "solemnly proclaimed" by the European Parliament, the Council of the European Union, and the European Commission on 7 December 2000. An adapted version of the Charter was proclaimed on 12 December 2007 in Strasbourg, ahead of the signing of the Treaty of Lisbon, which makes the Charter legally binding in all countries except Poland and the UK.[4]

Union: Human Rights Case Studies and QCA Coding", p. 2.

[4]Protocol No. 30 to Lisbon Treaty provides that the Charter does not extend the ability of the ECJ, or any court or tribunal of Poland or of the UK, to find that the laws, regulations or administrative

In the rejected EU Constitution Charter was integrated into the text of the treaty. Lisbon Treaty takes slightly different approach in its Article 6(1):

> The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.
>
> The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The Charter reaffirms in its Preamble the rights as they result, among others, from the constitutional traditions and international obligations common to the Member States, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law of the Court of Justice of the European Union and of the European Court of Human Rights. It is quite important that the Charter is not a new document completly independent of the ECHR and its extensive interpretation developped by the Court, and needs to be intepreted with due regard to the evolution of religious freedom protection in Europe.

Article 10 of the Charter states under the title "Freedom of thought, conscience and religion" the following:

> (1) Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.
>
> (2) The right to conscientious objection is recognised, in accordance with the national laws governing the exercise of this right.

The Explanation of the European Convention notes that the right guaranteed in paragraph 1 corresponds to the right guaranteed in Article 9 of the ECHR and, in accordance with Article 52(3) of the Charter, has the same meaning and scope. Limitations must therefore respect Article 9(2) of the ECHR.[5]

Although right to conscientious objection is not explicitly mentioned in the ECHR as military concepts were different in 1950,[6] the evolution of civil and military services

provisions, practices or action of Poland or of the UK are inconsistent with the fundamental rights, freedoms and principles that it reaffirms. In particular, nothing in Title IV of the Charter (Solidarity) creates justiciable rights applicable to Poland or the UK except in so far as Poland or the UK has provided for such rights in its national law.

[5] Praesidium of the European Convention. *Explanations relating to the complete text of the Charter as set out in the Charter*. European Convention, 2000. URL: `http://www.europarl.europa.eu/charter/pdf/04473_en.pdf` (visited on 01/05/2008), p. 12.

[6] For more details on conscientious objection under the ECHR see subsection 3.1.7 Conscientious objection.

during the second half of 20th century made it necessary to be mentioned in the Charter. However, the Charter itself does not go beyond recognition of the conscientious objection and leaves the conent of this right upon discretion of the Member States.

Article 14 deals with right to education and provides for the following:

> (1) Everyone has the right to education and to have access to vocational and continuing training.
>
> (2) This right includes the possibility to receive free compulsory education.
>
> (3) The freedom to found educational establishments with due respect for democratic principles and the right of parents to ensure the education and teaching of their children in conformity with their religious, philosophical and pedagogical convictions shall be respected, in accordance with the national laws governing the exercise of such freedom and right.

The Article 14 is based on Article 2 of the First Protocol to ECHR which was extended to vocational and continuing training and added the principle of free compulsory education. The latter might have also implications to "religiously unbiased" information provided in public schools.[7]

Article 21 provides for non-discrimination on the basis of, among others, religion or belief. It is important to note that Article 21 features for the first time a non-exhaustive list of grounds for discrimination. Actions to combat discrimination, especially anti-discrimination directives, are based on Article 13 TEC (Article 19 TFEU).[8] Article 21 further draws on Article 14 of the ECHR and Article 11 of the Convention on Human Rights and Biomedicine as regards genetic heritage. Insofar as it corresponds to Article 14 of the ECHR, it applies in compliance with it.[9]

Article 22 states:

> The Union shall respect cultural, religious and linguistic diversity.

Article 22 is based on Article 6 TEU and on Article 151(1) and (4) of the EC Treaty concerning culture. It is also inspired by declaration No. 11 to the Final Act of the Amsterdam Treaty on the status of churches and non-confessional organisations.[10]

---

[7] For further information on religion in education and case-law related to Article 2 of the First Protocol to ECHR see subsection 3.1.9 Freedom of Religion and Belief in Education.

[8] Article 13 TEC and anti-discrimination directives are further elaborated in section 5.3 Anti-Discrimination Law.

[9] Praesidium of the European Convention, *Explanations relating to the complete text of the Charter as set out in the Charter*, p. 23.

[10] Praesidium of the European Convention, *Explanations relating to the complete text of the Charter as set out in the Charter*, p. 23.

5.3 Anti-Discrimination Law

Non-discrimination can be understood in two ways: first, it is a general principle derived from the founding idea of human rights that "[a]ll human beings are born free and equal in dignity and rights" (Article 1 UDHR), which is maybe most aptly described by the Aristotelian principle that "likes should be treated alike" and is most often institutionalized in national constitutions and international human rights documents as the general provision of equality before the law. Second, it is also a specific human rights norm, proscribing discriminatory treatment on specific grounds, e.g. gender, race, disability, religion or belief.[11]

Anti-discrimination law has happened to be quite a dynamic area in the EU. As Evelyn Ellis noted, EU law has proved an ideal vehicle for upholding the principle of sex equality, in part at least because of the EU's undoubted potential for growth. That growth has taken place, and continues to occur, in a number of different ways. With the expansion of the Union's concerns to cover other grounds of discrimination, it would appear well-nigh inevitable that what has been true in the past for sex equality will also hold good for other fields of equality law,[12] e.g. for equality and non-discrimination based on religion or belief.

The Amsterdam Treaty marks an important step in the development of EU non-discrimination rules with the inclusion of Article 13 TEC, which states that the Community "may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation," thus significantly broadening the scale of the EU's legislative competence in the field. Although the article was carefully worded to avoid direct effect, and the threshold for adopting legislation was set rather high (unanimity in the Council), so that it could have been an "empty" promise[13], the Treaty provision was unexpectedly quickly filled with two directives in 2000, namely a "Framework Directive on equal treatment in employment and occupation"[14] (abbreviated as "Framework Directive" or "Employment Equality Directive" or "Framework Equality Directive"), and a "Directive on the prohibition of discrimination on the basis of racial or ethnic origin"[15] (the so-called "Race Equality Directive").[16]

The Commission made it clear at the time of proposing both Directives that an im-

[11] Schimmelfennig and Schwellnus, "The Constitutionalization of Human Rights in the European Union: Human Rights Case Studies and QCA Coding", p. 6.

[12] Evelyn Ellis. *EU Anti-Discrimination Law*. English. New York: Oxford University Press, 2005, p. 7.

[13] Lisa Waddington. "Testing the Limits of the EC Treaty Article on Non-discrimination". English. In: *The Industrial Law Journal* 28.2 (1999). Pp. 133–151, p. 138.

[14] Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

[15] Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin.

[16] Schimmelfennig and Schwellnus, "The Constitutionalization of Human Rights in the European Union: Human Rights Case Studies and QCA Coding", p. 9.

portant part of its motivation was that this anti-discrimination legislation should form part of the *acquis communautaire* before the accession of the new Member States. The grouping of the four, seemingly somewhat disparate, grounds together was also part of the Commission's strategy; it believed that the Member States were more enthusiastic about some of the grounds than about others, and it wanted to exploit the political momentum to ensure that it achieved legislation on all the bases mandated by Article 13. Nevertheless, this approach involves the risk of false consistency among the grounds.[17]

The notion of ethnicity in Race equality directive is quite elusive. The only hint given by the instrument that religion or religious heritage may play a part in defining ethnicity is in Recital 10 which refers to Commission Communication on "racism, xenophobia and anti-Semitism".[18] Ambiguity may play an important role because the two directives differ in material scope. Whereas the Employment Equality Directive applies only to to employment and occupation,[19] Racial Equality Directive applies to discrimination in employment, social security, health care, social advantage, education and access to and supply of goods and services including housing.[20] The differences in coverage of the two directives might suggest that there are clear boundaries between the concepts of race and ethnicity on the one hand, and religion on the other. However, at times the boundary between the two is not clear. The lack of clarity is caused by a number of factors: ethnicity is sometimes defined so as to include religious identity; and religious groups may be predominantly from one particular racial group. At times there are more fundamental complexities, with some states preferring not to recognise categories based on racial difference. Moreover, some religious groups may understand religion to encompass issues such as cultural practices or rituals, that might otherwise be understood as linked to ethnic identity.[21]

It is possible to argue that different scope of application of the two directives connected with unclear concepts of "religion" and "ethnicity" presents discrimination that is contrary to Article 13. This might be quite visible e.g. in case of following dietary requirements in school canteens by Jews (religious and ethnic group) and Adventists (religious group only).[22]

Neither the Framework Directive makes any attempt to define "religion or belief", so that similar problems of uncertainty occur here. Evelyn Ellis notes that, in using the bare but alternative expression "religion or belief", the Directive presumably means to encapsulate both religious beliefs (however "religion" is to be defined) and other philosophical beliefs

[17] Ellis, *EU Anti-Discrimination Law*, p. 33.

[18] COM (95) 653 final, 13 December 1995.

[19] Article 3, Framework Equality Directive 2000/78/EC.

[20] Article 3, Racial Equality Directive 2000/43/EC.

[21] Vickers, *Religion and Belief Discrimination in Employment — the EU law*, p. 34.

[22] This point was raised by Wolfgang Wieshaider on international conference dealing with status of national minorities "Právní postavení národnostních menšin v minulosti a současnosti" that took place in Prague on 5 and 6 May 2008.

on major issues such as life, death, and morality akin to, but not amounting to, religion; thus, a belief in a divine being or deity would appear to be unnecessary.[23]

An advantage of the lack of a formal definition is that the concept can adapt to reflect modern developments in our understanding of religion and belief. However, a corresponding disadvantage is that the lack of definition can give rise to inconsistencies in treatment. For example, Scientology is recognised in some Member States but not in others. It may be, according to Lucy Vickers, that the Member States' courts will be guided by the interpretation of the European Court of Human Rights.[24]

It would seem that although beliefs do not need to be religious in nature to be protected, there is still some limit on the types of belief to be covered. For example, a belief in the superiority of one football team over another will not be covered. What is not clear, however, is where exactly the dividing line should be drawn between beliefs which are protected and those which are not. Given that the term "belief" would encompass religious beliefs in any event, it would seem that the inclusion of the term "religion" is intended in some way to place some parameters around the meaning of "belief". Connected to this are e.g. questions whether to include also political opinion and non-belief.[25]

Apart from the question of whether a particular set of convictions constitute a religion or belief, difficulties may also arise in relation to well established religions, where there may be more than one view of what constitutes religious observance. This may arise where there is discrimination within one religious tradition. For the purposes of the Directive, recognition that there are many different shades of religious opinion will allow proper account to be taken of the individual's freedom of religion. This may, however, cause some problems with regard to indirect discrimination.[26]

The purpose of the Framework Directive is to lay down a general framework for combating discrimination on the grounds of (among others) religion or belief. It defines "principle of equal treatment" as absence of direct[27] or indirect discrimination.[28] The Directive protects not only against direct and indirect discrimination but also against harrassment, instructions to discriminate and victimization on grounds of religion or belief.[29]

Direct discrimination involves less favourable treatment on grounds of religion or belief. Factual examples will include where employers refuse to employ religious staff altogether,

[23] Ellis, *EU Anti-Discrimination Law*, p. 33.

[24] Vickers, *Religion and Belief Discrimination in Employment — the EU law*, pp. 4, 28–29.

[25] Vickers, *Religion and Belief Discrimination in Employment — the EU law*, pp. 29–30.

[26] Vickers, *Religion and Belief Discrimination in Employment — the EU law*, p. 31.

[27] Direct discrimination shall be taken to occur where one person is treated less favourably than another is, has been or would be treated in a comparable situation, on the grounds of religion or belief.

[28] Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons having a particular religion or belief at a particular disadvantage compared with other persons unless (i) that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary, or (ii) by measures taken to improve situation of persons with a particular dissability.

[29] Articles 2 and 11, Framework Equality Directive 2000/78/EC.

or employ some religious staff, but refuse to employ those of one particular religion. Direct discrimination will also arise where religious organisations refuse to employ those who do not share the faith of the organisation (although some cases may be covered by the "genuine occupational requirement" exception).[30]

Direct discrimination must be "on grounds of" religion or belief. The Directive is not limited to less favourable treatment on the grounds of a victim's own religion or belief. It would therefore cover treatment based on the discriminator's assumption about a person's religion, even though this assumption may be mistaken; as well as discrimination based on a person's association with people of a particular religion. The Directive may also protect against discrimination based on the employer's religious views; for example, a Catholic employer could dismiss an employee for marrying a divorced person, and the less favourable treatment would still be "on grounds of religion". However, some states such as the UK have specifically ruled out this possibility.[31]

Indirect discrimination occurs "where an apparently neutral provision, criterion or practice would put persons of a particular religion or belief ... at a particular disadvantage compared with other persons" unless it can be justified. Factual examples will include where the employer imposes requirements in terms of uniforms or hours of work, with which it is difficult for those of particular religions to comply. Indirect discrimination is capable of justification where the practice or criterion can be objectively justified by a legitimate aim and the means of achieving the aim are appropriate and necessary. The question of justification is usually left to domestic courts, but what is not yet clear is the type of factor that courts should accept as justifying indirect religious discrimination.[32]

Both direct and indirect discrimination require comparisons to be made with others. Direct discrimination is defined as less favourable treatment than another "in a comparable situation"[33] and indirect discrimination involves disadvantage "compared with other persons".[34] This immediately raises the question of when two situations will be said to be comparable. The Directive does not provide clear answers to the question of who the correct comparator might be, and national implementing legislation has generally incorporated the wording of the Directive, or used slightly different wording, without addressing the question of comparators. It would seem that if the recitals clauses are to be respected, and the commitments to equality and respect for human rights contained within them are to be upheld, then once less favourable treatment can be shown in comparison with another group, the discrimination finding should be made, whether that comparison is with those of a majority religion, minority religion, established religion or no religion. The fact that treatment may be similar to that of a third group should not

[30] Vickers, *Religion and Belief Discrimination in Employment — the EU law*, p. 12.
[31] Vickers, *Religion and Belief Discrimination in Employment — the EU law*, p. 12.
[32] Vickers, *Religion and Belief Discrimination in Employment — the EU law*, pp. 13–14.
[33] Article 2(2)(a), Framework Equality Directive 2000/78/EC.
[34] Article 2(2)(b), Framework Equality Directive 2000/78/EC.

prevent a finding of discrimination as between the two chosen groups.[35]

The Directive deems harassment to be a form of discrimination, where there is unwanted conduct related to religion and belief with the purpose or effect of violating the dignity of a person and of creating an intimidating, hostile, degrading, humiliating or offensive environment.[36] The Directive does not set out how to determine whether or not dignity is violated, nor how to determine whether an environment is hostile or offensive. In the case of well-known religions it might be practicle to give weight to the views of the formal authorities of the religion. However, it is arguable that such an approach will protect the individual religious person sufficiently, as religious belief is an intensely personal matter, and levels of offence cannot be determined by outside agencies, even if those agencies are official religious bodies. Moreover, less well known religious groups may lack clear statements of faith, and it may not always be easy to come to a clear conclusion about whether individuals are justifiably offended. Yet to allow too subjective a test of offence could have a chilling effect on freedom of speech.[37]

The Employment Equality Directive applies to conditions for access to employement, self-employment, occupation, (vocational) training or other work experience, and to working conditions. However, Memeber States may provide for exception for occupational activities within churches and other public or private organisations the ethos of which is based on religion or belief where, by reason of the nature of these activities or of the context in which they are carried out, a person's religion or belief constitute a genuine, legitimate and justified occupational requirement, having regard to the organisation's ethos. The difference of treatment should, of course, take into account constitutional provisions and principles of the Member State and general principles of Community law. This exception should not be used for justification of discrimination on another ground. [38]

As Lucy Vickers points out, many of the questions that arise in relation to the Directive will ultimately be determined by considering the scope of the genuine occupational requirement provisions. These provide the only defence to direct discrimination. Some of the terminology and concepts are similar to that in indirect discrimination, as they both require exceptions to the non-discrimination principle to be justified as necessary for a legitimate aim and proportionate. It is through the interpretation of these concepts that the boundaries of Directive's protection against discrimination on religious grounds will be set.[39]

Article 4(1) is not particularly controversial. In the context of religious discrimination it enables the right to religious freedom and other rights to be balanced against each other in the employment context. It only applies where there is a very clear connection between

[35] Vickers, *Religion and Belief Discrimination in Employment — the EU law*, pp. 14–15.
[36] Article 2(3), Framework Equality Directive 2000/78/EC.
[37] Vickers, *Religion and Belief Discrimination in Employment — the EU law*, pp. 15–16.
[38] Articles 3 and 4, Framework Equality Directive 2000/78/EC.
[39] Vickers, *Religion and Belief Discrimination in Employment — the EU law*, p. 56.

the work to be done and the characteristics required: the occupational requirement must be genuine and determining, and it must be proportionate in the particular case involved. It will be necessary to consider the requirements of the job very closely before being able to use the exception. Thus, religious discrimination under Article 4(1) is only really likely to be lawful in cases of those employed in religious service, whose job involves teaching or promoting the religion, or being involved in religious observance.[40]

More controversial is the additional exception to the principle of non-discrimination contained in Article 4(2), which applies only to churches or other public or private organisations which have an ethos based on religion and belief. The exception is broader than that provided for by Article 4(1) as the genuine occupational requirement does not have to be determining although it does still need to be legitimate and justified. This suggests a less rigorous approach in deciding whether the particular job requires a particular characteristic than that required by Article 4(1), where the emphasis is clearly on the nature of the job itself. The aim of the provision is to allow a religious ethos organisation to require loyalty and good faith to its ethos. In relation to religious employers it may be possible to argue that a workplace has a particular religious ethos, because its staff is all from the same religion, and it operates according to that religious ethos. This may then lead to employers imposing religious requirements on a broader range of staff, such as administrative staff or catering or cleaning staff. Although they do not need to be determining requirements, requirements must be genuine and occupational, so must be linked to the job in question.[41]

The protection available to religion within the Directive is limited to the prohibition of direct and indirect discrimination, harassment and victimisation. It does not, on its face, impose a duty on employers to make reasonable accommodation for the needs of religious employees. In this regard it can be contrasted with the duty to accommodate disability which is specifically provided within the text of the Directive. If a duty of reasonable accommodation can be read into the Directive, its extent will be determined by the scope of the justification defence available in indirect discrimination cases. Where a requirement can be objectively justified by a legitimate aim and the means of achieving the aim are appropriate and necessary, there is no indirect discrimination. If this justification standard is interpreted in the same way as it is in sex equality cases, this will mean that any requirement must have a legitimate aim, the means chosen for achieving that objective must correspond to a real need on the part of the undertaking, must be appropriate with a view to achieving the objective in question and must be necessary to that end.[42]

The Framework Directive also allows support of the complainant by associations, organ-

[40] Vickers, *Religion and Belief Discrimination in Employment — the EU law*, p. 56.

[41] Vickers, *Religion and Belief Discrimination in Employment — the EU law*, pp. 56–57.

[42] *Bilka-Kaufhaus v. Weber von Hartz,* Case 170-84 (1986). Vickers, *Religion and Belief Discrimination in Employment — the EU law*, pp. 20–23.

isations or other legal entities with legitimate interest under the Directive.[43] The burden of proof is, as in other anti-discrimination directives, shifted to the respondent.[44]

The relation between anti-discrimination legislation and other human rights regulation is not possible to be easily defined. This might be partially based on interconnectedness of "freedom of religion" and "freedom from discrimination" that are complementary but still sometimes in tension. Lucky Vickers mentiones three conflicting areas of these rights. Firstly, many religions do not recognise fundamental rights and freedoms of others,[45] such as rights not to be discriminated against on grounds of birth, status, gender, sexual orientation or other grounds. Secondly, clashes can arise between various human rights where religious interests are concerned. Thirdly, and perhaps more fundamentally, it is not clear what connection there is between freedom of religion and non-discrimination rights (the positive aspect of freedom of religion), with a more general freedom to be protected from religion (the negative aspect of freedom of religion).[46]

There have been supposed to be more directives implementing Article 13 TEC, especially outside of employment. The current Commission is, however, not able to deliver all of them before end of its term. Thus Vladimír Špidla stated that the Commission's proposal on non-discrimination outside employment will cover only disability. The other grounds of discrimination, i.e age, sexual orientation, religion and belief are to be covered by a communication (non-binding document).[47]

5.4 European Court of Justice

The European Court of Justice has not had much chance to deal with cases related to freedom of religion or belief, especially because religion has not been dealt with to great extent by EC law. The persons who have felt their freedom of religion violated usually have taken recourse to the European Court of Human Rights. Hence, this section presents only two cases: *Prais v. Council* being landmark in human rights protection provided by ECJ and *Steymann v. Staatssecretaris van Justitie* dealing with activities of religious communities.

Vivien Prais applied for a job of linguistic expert (translator) in the Council of the European Communities. A written test in the competition was scheduled for Friday, 16 May 1975. That very day was also the first day of Jewish feast Shavuot.[48] Vivien Prais

[43] Article 9, Framework Equality Directive 2000/78/EC.

[44] Article 10, Framework Equality Directive 2000/78/EC.

[45] It may be more accurate not to talk about "religions" but rather "religious groups" as it is possible to find almost in every religion group of people recognising fundamental rights and freedoms of the others — and a group of people opposing them.

[46] Vickers, *Religion and Belief Discrimination in Employment — the EU law*, p. 40.

[47] Further information and strong opposition to narrowing the scope of the directive presented by European Social NGOs can be found at http://www.socialplatform.org/News.asp?DocID=17207.

[48] Shavuot is the second of the three major Jewish festivals (Passover being the first and Sukkot the

asked for another day for the test as her religion had not permitted her to travel or write on that date. She received a reply that it was not possible to fix another date as it was essential that all candidates were examined on tests passed on the same date.[49]

The plaintiff claimed that the refusal of her request had as a result preventing her from taking part in the competition based on her religious convictions. That was allegedly contrary to Staff Regulations ("officials shall be selected without reference to race, creed or sex") and contrary to fundamental rights as protected by community law. She also relied on Article 9(2) of the European Convention with argumentation that "since the European Convention has been ratified by all the member states, the rights enshrined in it are ... to be regarded as included in fundamental rights protected by community law." She claimed that Staff Regulations are to be interpreted in such a manner that the defendant should so arrange the dates of tests as to enable every candidate to take part in the tests irrespective of his religion. Alternatively she based this requirement on the European Convention.[50]

Council of the European Communities (defendant) opposed her claim with argumentation that it would be too demanding for administration to fix date for test so that it is suitable for all possible religions.[51]

The EJC accepted argument of the Council and stated that when a competition is on the basis of tests, the principle of equality necessitates that the tests shall be on the same conditions for all candidates (especially when written test is concerned). And the interest of participants not to have a date fixed for the test which is unsuitable must be balanced against this necessity. So, if a candidate informs the appointing authority that religious reasons make certain dates impossible for him the appointing authority should take this into account in fixing the date for written tests, and endeavour to avoid such dates. On the other hand if the candidate does not inform the appointing authority in good time of his difficulties, the appointing authority would be justified in refusing to afford an alternative date, particularly if there are other candidates who have been convoked for the test.[52]

The ECJ further noted that an appointing authority might inform itself in a general way of dates which might be unsuitable for religious reasons and seeks to avoid fixing such dates for tests, nevertheless, neither the staff regulations nor the fundamental rights could be considered as imposing on the appointing authority a duty to avoid a conflict with a religious requirement of which the authority has not been informed.[53]

---

third) and occurs exactly fifty days after the second day of Passover. This holiday marks the anniversary of the day when Israel received the Torah at Mount Sinai.

[49]Para. 1–3, *Prais v. Council of the European Communities,* Case 130-75 (1976).

[50]Para. 6–9, *Prais v. Council of the European Communities,* Case 130-75 (1976).

[51]Para. 10–11, *Prais v. Council of the European Communities,* Case 130-75 (1976).

[52]Para. 13–17, *Prais v. Council of the European Communities,* Case 130-75 (1976).

[53]Para. 18, *Prais v. Council of the European Communities,* Case 130-75 (1976).

Based on this balancing of interests the ECJ rejected the claim of Vivien Prais.[54]

In case of *Udo Steymann v. Staatssecretaris van Justitie* arose question to what extent activities performed by a member of a religious community may be regarded as economic activities or services within the meaning of the EEC Treaty. Mr Steymann, a German national, settled in the Netherlands on 26 March 1983. For a short period he was in paid employment as a plumber. Subsequently, he became a member of the religious community known as "De Stad Rajneesh Neo-Sannyas Commune" ("the Bhagwan Community") which supplies its material needs by means of commercial activities, which include running a discothèque, a bar and a launderette. Mr Steymann's contribution to the life of the Bhagwan Community consisted in the performance of plumbing work on the community's premises and general household duties. He also took part in the community's commercial activity. The community provided for the material needs of its members in any event, irrespective of the nature and the extent of their activities.[55]

Mr Steymann applied for a Netherlands residence permit in order to pursue an activity as an employed person. The chief of the local police turned down his application and so did the Staatssecretaris van Justitie (on the ground, inter alia, that he was not pursuing an activity as an employed person and consequently was not a favoured EEC national within the meaning of the Netherlands legislation on aliens). Thus, he appealed to the Raad van State against that decision of the Staatssecretaris van Justitie on the ground that as a member of the Bhagwan Community he was both a recipient of services from, and a provider of services to, that community. The national court stayed the proceedings and turned to ECJ.[56]

The national court sought to establish to what extent activities performed by members of a community based on religion or another form of philosophy as part of the activities of such a community may be regarded as economic activities within the meaning of the EEC Treaty. The ECJ answered that Article 2 of the EEC Treaty must be interpreted as meaning that activities performed by members of a community based on religion or another form of philosophy as part of the commercial activities of that community constitute economic activities in so far as the services which the community provides to its members may be regarded as the indirect *quid pro quo* for genuine and effective work.[57]

In this connection it might be interesting to mention case that was dealt under the ECHR in which the Commission drew up a distinction between religious advertisement with merely "informational" or "descriptive" character — and advertisement for marketing goods. The former falls within protection of Article 9(1) ECHR, whereas the letter not.[58]

[54]Para. 19–20, *Prais v. Council of the European Communities,* Case 130-75 (1976).

[55]Para. 2–4, *Udo Steymann v. Staatssecretaris van Justitie,* Case 196-87 (1988).

[56]Para. 5–6, *Udo Steymann v. Staatssecretaris van Justitie,* Case 196-87 (1988).

[57]Para. 8 and 14, *Udo Steymann v. Staatssecretaris van Justitie,* Case 196-87 (1988).

[58]"[T]he concept, contained in the first paragraph of Article 9, concerning the manifestation of a

5.5 The European Union Agency for Fundamental Rights

The European Union Agency for Fundamental Rights (FRA) is a body of the European Union, established through Council Regulation (EC) No. 168/2007 of 15 February 2007. It is based in Vienna and is being built on the European Monitoring Centre on Racism and Xenophobia. The objective of the Agency is to provide the relevant institutions and authorities of the Community and its Member States when implementing Community law with assistance and expertise relating to fundamental rights in order to support them when they take measures or formulate courses of action within their respective spheres of competence to fully respect fundamental rights.[59]

The Agency carries out its tasks within the competencies of the Community, as laid down in the EC Treaty. The Agency refers to fundamental rights within the meaning of Article 6(2) of the Treaty on European Union, including the European Convention on Human Rights and Fundamental Freedoms, and as reflected in the Charter of Fundamental Rights.

FRA's founding Regulation also underlines the importance of coordination with the Council of Europe in order to avoid duplication, ensure complementarity and mutually reinforce each other's work. To this end, a cooperation agreement with the CoE has been concluded. The FRA has established relations with the Council of Europe's European Commission against Racism and Intolerance (ECRI), the Commissioner for Human Rights and the Council of Europe's departments responsible for social cohesion issues. The Regulation also forsees co-operation with OSCE and UN bodies as well as national human rights institutions in the Member States.

Among the themes set up in a Multiannual Framework for the period 2007–2012 is also "discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation or of persons belonging to minorities". Some aspects of freedom of religion should be also addressed in thematic area of "immigration".[60]

---

belief in practice does not confer protection on statements of puported religious belief which appear as selling "arguments" in advertisements of a purely commercial nature by a religious group. In this connection the Commission would draw a distinction, however, between advertisements which are merely "infrmational" or "descriptive" in character and commercial advertisements offering objects for sale. Once an advertisement enters into the latter sphere, although it may concern religious objects central to a particular need, statements of religious content represent, in the Commission's view, more the manifestation of a desire to market goods for a profit then the manifestation of a belief in practice, whithin the proper sense of that term." *X. and the Church of Scientology v. Sweden,* app. no. 7805/77 (1979).

[59] Article 2, Council Regulation (EC) No. 168/2007.

[60] Commission's proposal COM (2007) 0515 Final.

5.6 Treaty of Lisbon

The Treaty of Lisbon amending the Treaty on European Union (TEU) and the Treaty establishing the European Community (TEC) has been signed in Lisbon on 13 December 2007 by the representatives of the 27 Member States. TEC has been renamed Treaty on the Functioning of the European Union (TFEU).
In accordance with its Article 6, the Treaty will have to be ratified by the Member States in accordance with their respective constitutional requirements and will enter into force on 1 January 2009, provided that all instruments of ratification have been deposited, or, failing that, on the first day of the month following the deposit of the last instrument of ratification.

In the field of religious rights, and human rights in general, the Treaty of Lisbon makes a significant step. Not only it lifts up Charter of Fundamental Rights to the level of other treaties (primary law), but it also tries to shed more light on EU's relation to ECHR. Article 6 provides:

> (2) The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.
>
> (3) Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

The Intergovernmental Conference in Lisbon declared that the Union's accession to the ECHR should be arranged in such a way as to preserve the specific features of Union law. It noted particularly that the existence of a regular dialogue between the Court of Justice of the European Union and the European Court of Human Rights should be reinforced when the Union accedes to ECHR.[61]

The preamble of the consolidated version of the TEU mentions "cultural, religious and humanist inheritance of Europe". Article 13 TFEU states that the Union and the Member States shall in formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage.

Lisbon Treaty provides for the first time regulation of the EU's relation to religious communities. Article 17 provides the following:

[61] Declarations annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007.

> (1) The Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States.
>
> (2) The Union equally respects the status under national law of philosophical and non-confessional organisations.
>
> (3) Recognising their identity and their specific contribution, the Union shall maintain an open, transparent and regular dialogue with these churches and organisations.

The mere recognition and respect of the national status of churches, religious association, communities philosophical and non-confessional organisations is not that revolutionary. What makes, however, a step forward to churches and faith-based organisations is maintenance of "open, transparent and regulard dialogue". This might raise the importance especially of religious representations in the European institutions.

5.7 Concluding Remarks

The European Communities were founded mainly on economic and political grounds. However, as quite substantial part of European citizens is not able to found their lives on economic premises, religious and cultural aspects started to penetrate through economic and political integration.
The ECJ recognized among other human rights also freedom or religion and belief. The Commission managed to develop anti-discrimination legislation based on Article 13 TEC, which is also directed against discrimination on grounds of religion and belief. The European Convention drafted Charter of Fundamental Rights giving important place to freedom of religion, thought and conscience. If Lisbon Treaty is ratified by all Member States, Charter will become legally binding as part of primary law and the EU will join the ECHR as interpreted by the European Court of Human Rights.
Apart from religion becoming more and more present in legal documents, there is a special space for religious and cultural elements of EU citizens' lives that has been confirmed by proclaiming the year 2008 the Year of Intercultural Dialogue.

6 Conclusion

Freedom of thought, conscience and religion is one of the foundations of democratic society. This basis was proclaimed by the European Court of Human Rights and is acceptable to vast majority of of secular and religious thinkers and institutions.
However, opinions start to radically differ when we get to more specific meaning of the concept of freedom of religion, when we get to conflicts with other fundamental rights and freedoms, or when we get to implementation of religious freedom in a particular situation.
We observed that freedom of religion could be based on various fundaments. One of the possible ways of approaching this liberty is to start with human dignity. Dignity that a person enjoys irrespectively of his or her performance or deeds of his or her predecessors. It is possible to argument in favour of human dignity as it was "gift of God" or part of "natural order", thus this idea is in principle acceptable for both religious and non-religious people.
Concept of religious freedom shares with concept of religion, among others, characteristic intagibility. We observed that people negotiating treaties (and other laws) and courts interpreting them struggle with what is still to be included in religion or belief and what is not — in order to maintain protection effective and prevent abuses. All the way it is sailing in between Scylla of objective all-encompassing definition and Charybdis of treating as religion or belief everything a person wishes to. It is quite an embarrassing discovery that courts do not approach this problem consistently, favours well-known religions and orient themselves according to their limited knowledge of "new" or "alternative" religious movements. This approach is not respectful to religious freedom of affected individuals and certainly it is not an indication of all people being "equal in dignity".
Analysis of various cases, especially before the European Court of Human Rights, confirms the hypothesis that quite many tensions stem from Western division of religious freedom on *forum internum* and *forum externum*. This division is unknown and unacceptable particularly for non-Europeans trying to live their faith in all aspects of their life. They cannot understand how is it possible for somebody to be claiming adherence to freedom of religion and still be able to publish cartoons insulting the Prophet Muhammad (and thus all Muslims) or to prohibit wearing headscarfs in public schools. Thus it is understandable that many people have questioned the whole division. It is quite interesting to observe that advocates of the division do not have persuasive arguments for trying to draw a borderline between "what person believes in" and "what person does". Courts decided in favour of having some kind of elusive borderline in order to maintain neutrality, equal treatment and non-discrimination. These ideals are fundamental for European democracy, however, maintaining them by forcing people to live schizofrenic lifes of "internal freedom" and highly regulated public manifestations, forms a parallel with totalitarian regimes and certainly does not respect human being in

his or her dignity. Hence, it will be interesting to observe development in this area in coming years as it would be foolish to assume that current "religious revival" is over and religion is to be considered as a historical phenomenon.

Legal instruments for protection of religious freedom that were considered in this paper substantially influenced one another. This is quite understandable given the difficulties in negotiating any provisions dealing with freedom of religion or belief. It is possible to say that European Convention for the Protection of Human Rights and Fundamental Freedoms, which became the most effective tool for protection of religious freedom, is based on wording of Universal Declaration of Human Rights. While developing quite an elabore case-law by the Commission and Court, newer instruments and developments in the United Nations were also taken into consideration.

Due to developed and (more or less) effective human rights protection scheme of the European Court of Human Rights, and due to emphasis on economic and political integration, it is understandable that the European Communities (Union) have not developed an independend system for protection of religious freedom. However, the EC legislated extensively in the field of anti-discrimination on various grounds; for us are important anti-dicrimination provisions on the grounds of religion, faith or belief, and ethnic orgigin (as ethnicity is in some cases interconnected with religion). The anti-discrimination provisions are, nonetheless, not very systematic and implemented in quite differing ways. Hence, it is up to the future interpretation (possibly in connection with Lisbon Treaty, if ratified) to shed more light on protection of religious freedom in the EU.

České resumé

Evropa se nepovažuje za příliš náboženský kontinent. A pokud si nějaké náboženské tradice přiznává, pak jsou spojovány s křesťanstvím, které bylo vytlačeno z veřejného života. Plná svoboda náboženství je možná jen ve vnitřním světě člověka, v rámci tzv. *forum internum*. Manifestace náboženského přesvědčení navenek je podrobena řadě omezení, která se liší v jednotlivých částech Evropy především podle historického vývoje a přítomnosti konkrétních náboženských skupin.

Oddělení vnitřního náboženského přesvědčení a jeho vnější manifestace může působit poněkud schizofrenně, především pro věřící, kteří se snaží žít svou víru naplno. Dalo by se říci, že souvisí především se Západní sekulární tendencí reagující na dějiny plné náboženského napětí a konfliktů. Není však přijímáno nekriticky — především pro nekřesťanské náboženské okruhy jde o poměrně cizí koncepci. A dokonce ani řada křesťanských myslitelů by se pod něj nedokázala podepsat.

Základní tezí, kterou se tato práce nastiňuje je, že rozdíl v pojetí celistvosti víry a náboženství (popř. dělení na *forum internum* a *forum externum*) má zásadní vliv na pojetí náboženské svobody. Vede často ke konfliktům s dalšími základními právy, které se zdají obecně neřešitelnými, což je zřetelné v nejednotné rozhodovací praxi státních orgánů a soudů.

V médiích současnosti je obzvláště zřetelný konflikt mezi svobodou náboženství a svobodou projevu. Především publikace karikatur proroka Mohameda vyvolala ostřejší reakce než jejich původci předpokládali. S trochou odstupu by se dalo říci, že řada reakcí vycházela a vychází z nepochopení chybějící hranice mezi vnitřním přesvědčením a jeho vnějším projevem, mezi testem mezí svobody projevu a cíleného útoku na celý náboženský systém.

Další oblastí neutuchajících diskusí je místo náboženství ve vzdělávacím systému. Pro řadu rodičů je klíčové, aby jejich děti měly ve škole možnost seznámit se se základy určitého náboženského a hodnotového systému. Jiní rodiče požadují naprosto „neutrální“ prezentaci „běžných“ náboženství v rámci společenských věd. A další by si přáli naprostou absenci náboženství v rámci vzdělávací soustavy. Jak usmířit tyto rozdílné požadavky? Jakým způsobem má reagovat stát? Jak má být uspořádáno veřejné vzdělávání? A jaké to má mít dopady na soukromé školství? To jsou jen některé ze základních otázek souvisejících se svobodou náboženství a právem na vzdělání. Každý stát a mezinárodní instituce na ně odpovídá rozdílným způsobem.

Ve školství došlo v řadě zemí k zákazu nošení náboženských symbolů. To vyvolává obecnější otázky ohledně manifestace náboženství na veřejnosti. Nastupuje zde také otázka diskriminace, především nepřímé, všude, kde se člověk, jehož náboženství je známo, vyskytuje.

Mohlo by se jevit, že náboženská příslušnost a náboženské přesvědčení jsou statickými

záležitostmi. Řada věřících však považuje svůj náboženský život za „duchovní cestu“.[1] Často lidé stráví celou svou duchovní cestu uvnitř jednoho náboženského systému, ale rozhodně to nejde považovat za pravidlo. Většina duchovních cest totiž vybízí k zamyšlení se nad způsobem života každého člověka, k uvědomění si toho, co dělá špatně — a ke změně smýšlení. Zde se pak dostáváme k otázce proselytismu, k určování, nakolik je možná asistence jiného člověka v průběhu „proměny smýšlení“. Je pochopitelné, že se většina náboženských komunit, obzvláště pokud se považují za jedinou cestu ke spáse, bude zasazovat o to, aby náboženská svoboda byla možná směrem dovnitř, ale nikoliv ven. To nás staví před otázku, jakým způsobem má tuto oblast regulovat stát, obzvláště pokud jde o stát, který má úzkou vazbu k určitému náboženství či náboženské organizační struktuře.

Jak je vidět, když začne být svoboda náboženství nahlížena v širších souvislostech, staví nás před řadu otázek. Otázek, které není možno jednoduše vyřešit v obecné rovině pro všechny možné případy. Tato práce se snaží stručně nastínit některé z možných přístupů, které se vyskytují v činnosti Rady Evropy, Organizace spojených národů a Evropského společenství (Evropské unie). K řadě z nich přistupuje kriticky a snaží se poskytnout podněty pro nalézání cest odpovídajících náboženskému přesvědčení jednotlivých věřících, jež je primárním objektem ochrany svobody náboženství.

Vzhledem k tomu, že otázky související s náboženstvím jsou většinou poněkud kontroverzní a odpovědi na ně různorodé, jeví se nutným poznamenat tato práce odráží především pozici autora, který je praktikujícím křesťanem aktivním v mezináboženských vztazích, především v křesťansko–muslimském dialogu.

Pojem svobody náboženství

Svoboda náboženství není jednoduše definovatelný termín, což souvisí především s obtížnou definicí náboženství jako takového. S tím právo samozřejmě nemálo zápasilo a zápasí, což je zřejmé z většiny mezinárodních dokumentů zabývajících se svobodou náboženství a na ně navazující interpretační činnosti.

Evropský soud pro lidská práva (ESLP) se například nevydal obecným vymezením toho, co lze považovat za náboženství, a co je tedy hodno ochrany pod hlavičkou náboženské svobody. Spíše v jednotlivých (hraničních) případech určoval, co ještě považuje za náboženství, a co již nikoliv. Tak např. pod ochranu čl. 9 Evropské úmluvy zahrnul ateismus[2] nebo druidismus,[3] ale nezahrnul náboženství wicca.[4]

Na druhou stranu Nejvyšší soud Spojených států amerických založil své rozhodování na

[1] Např. judaimus mluví o „cestách lidu izraelského“, o následování Hospodina. Křesťanství považuje Krista za tu pravou cestu ke spáse. Klíčový znak čínských náboženství, *tao*, doslova znamená „cesta“.

[2] *Angeleni v. Švédsko,* stížnost č. 10491/83 (1986).

[3] *A.R.M. Chappell v. Spojené království* (1987).

[4] *X. v. Spojené království,* stížnost č. 7291/75 (1977).

pozitivní definici, kterou převzal od významného teologa Paula Tillicha. Tillich stavil na termínu *ultimate concern*, tedy na něčem, co je nejvlastnějším zájmem člověka, na nečem, co se člověka bezprostředně (do)týká. Nejvyšší soud tak považuje za náboženství přesvědčení daného člověka, pokud je schopen prokázat, že jeho přesvědčení je jeho nejvlastnějším zájmem, který je bezpodmínečný (neumožňuje kompromis).[5]
Subjektivní definice je výhodná především pro malá a „nová“ náboženství, která většinou nenaplňují standardy stanovené většinovou společností. Zahrnující schopnost však může být i slabostí subjektivního přístupu, protože do jedné kategorie mohou spadat i nejvlastnější zájmy jako fotbal, sledování televize nebo ochrana lidských práv.
K definování náboženství je možné přistupovat také analogickým způsobem. Kent Greenawalt navrhl, aby se za náboženství považovalo ve sporných případech to, co analogicky naplňuje podobné znaky jako to, co je bezpochyby náboženstvím. Žadatel o ochranu by tak musel prokázat dostatek sdílených znaků jeho víry s tím, co je bezpochyby považováno za náboženství stejně jako ukázal Ludwig Wittgenstein, že pojem „hra“ nemá společnou definici, ale jde spíše o souhrn podobností.[6]

Objasnění obsahu náboženské svobody může napomoci běžné dělení na pozitivní náboženskou svobodu (*„svobodu k“*) a negativní náboženskou svobodu (*„svobodu od“*). Pozitivní náboženská svoboda je založena na svobodě individua chovat náboženskou víru nebo přesvědčení a vyjadřovat ji přiměřeným způsobem na veřejnosti, ať osamoceně, nebo ve společenství s dalšími. Negativní náboženská svoboda pak spočívá ve svobodě od donucení, nátlaku nebo indoktrinace v náboženských otázkách. Tato „dvoustranná“ svoboda nachází protipól v povinnosti neutrality státu ve vztahu k náboženstvím nacházajícím se na jeho území.

Někdy se pro zdůvodnění nezbytnosti svobody náboženství argumentuje historicky: když se podíváme na dějiny plné náboženských válek a násilí ve jménu víry, není zde jiné možnosti než hájit náboženskou svobodu. To neznamená, že by náboženská svoboda byla hodnotou sama o sobě, jen se k ní je vhodné pragmaticky uchýlit.[7]
Jiným možným způsobem, jak přistupovat ke svobodě náboženství je začít u lidské důstojnosti. To je cesta, kterou nastoupila řada náboženských i sekulárních myslitelů. Podle Wolganga Hubera je *etika důstojnosti* (na rozdíl od *etiky zájmu*) zakořeněna ve znovuobjevení protestantské reformace. Ta učí, že člověk není tvořen svými vlastními výkony a ani nemůže dosáhnout konečného uznání svým úsilím. Ne lidská dokonalost, ale boží milost tvoří lidskou bytost. Lidská důstojnost není ani v moci jiných lidí, ani společnosti nebo státu. Člověk je ve svém časově omezeném působení na světě obdařen nekonečnou

[5] *Spojené státy v. Seeger*, 380 U.S. 163 (1965). Carolyn Evans. *Freedom of Religion under the ECHR*. Anglicky. Oxford: Oxford University Press, 2001, strana 63.

[6] Ludwig Wittgenstein. *Filosofická zkoumání*. Praha: Filosofia, 1993. Kent Greenawalt. “Religion as a Concept in Constitutional Law”. In: *California Law Review* 72.5 (1984). Strany 753–816, strany 762–764. Evans, *Freedom of Religion under the ECHR*, strana 63.

[7] Evans, *Freedom of Religion under the ECHR*, strana 24.

důstojností, která je naprosto nezaslouženou milostí Boží.[8]
Etiku důstojnosti „sekulárním způsobem“ nejznáměji shrnul Immanuel Kant jako jednu z formulací kategorického imperativu: „Jednej tak, abys používal lidství jak ve své osobě, tak i v osobě každého druhého vždy zároveň jako účel a nikdy pouze jako prostředek.“ Tato formule zdůrazňuje opět, že si žádná osoba nemůže nárokovat definování druhého člověka nebo dispozici s ním.[9]

Svoboda náboženství patří mezi hodnoty vyznávané řadou světových náboženství. Dokonce by se dalo říci, že v některých případech je náboženská svoboda v náboženství přímo zakořeněna. Takový soud však není možné obecně hájit, protože jednotlivá náboženství rozhodně nejsou jednolitými celky, ale existují ve značné vnitřní rozrůzněnosti. Je možné tvrdit, že prakticky v každém náboženském systému se nalezne určitá skupina považující svobodu náboženství za nezbytnou součást jejich víry — stejně jako skupina zpochybňující náboženskou svobodu jako takovou.
Tyto rozdíly často vyplývají z různé interpretace svatých písem daného náboženství. Ačkoliv se mnozí snaží zdůraznit stálost a neměnnost svatého textu, moderní hermeneutika ukazuje na klíčovou roli interpreta, jeho zkušenosti a předporozumění. Není tedy vhodné a možné žádný výklad absolutizovat jako ten jediný správný pro danou náboženskou skupinu. To má samozřejmě nemalé důsledky v právu především pro orgány veřejné správy a soudy, pokud se chtějí obracet na nějakého náboženského představitele se žádostí o autoritativní výklad určité problematiky.

Svoboda náboženství v rámci Rady Evropy

Posláním Rady Evropy je rozvíjet prostor demokracie, svobody a lidských práv v evropském regionu. Jak zdůraznil Evropský soud pro lidská práva v rozsudku *Kokkinakis v. Řecko*, „svoboda myšlení, svědomí a náboženství je jedním ze základů demokratické společnosti v pojetí Evropské úmluvy. Ve své náboženské dimenzi je jedním z klíčových prvků tvořících identitu věřích a jejich pojetí života, ale je také cenným přínosem pro ateisty, agnostiky, skeptiky a lidi nejevící zájem o náboženství. Závisí na ní pluralismus neodlučitelný od demokratické společnosti, který byl těžce vybojován v průběhu staletí.“[10]
Úmluva o ochraně lidských práv a základních svobod (Evropská úmluva) upravuje svobodu náboženství především ve svém čl. 9:

> (1) Každý má právo na svobodu myšlení, svědomí a náboženského vyznání;

[8] Wolfgang Huber. “Human Rights and Biblical Legal Thought”. In: *Religious Human Rights in Global Perspective. Religious Perspectives.* Anglicky. Ed. John Witte a Johan D. van der Vyver. The Hague: Kluwer Law International, 1996, strana 55.

[9] Immanuel Kant. *Základy metafyziky mravů.* Praha: Svoboda, 1990, strana 91. Huber, “Human Rights and Biblical Legal Thought”, strana 56.

[10] *Kokkinakis v. Řecko,* stížnost č. 14307/88 (1993).

> toto právo zahrnuje svobodu změnit své náboženské vyznání nebo přesvědčení, jakož i svobodu projevovat své náboženské vyznání nebo přesvědčení sám nebo společně s jinými, ať veřejně nebo soukromě, bohoslužbou, vyučováním, prováděním náboženských úkonů a zachováváním obřadů.
>
> (2) Svoboda projevovat náboženské vyznání a přesvědčení může podléhat jen omezením, která jsou stanovena zákony a která jsou nezbytná v demokratické společnosti v zájmu veřejné bezpečnosti, ochrany veřejného pořádku, zdraví nebo morálky nebo ochrany práv a svobod jiných.

Svoboda náboženství je chráněna také zákazem diskriminace v čl. 14:

> Užívání práv a svobod přiznaných touto Úmluvou musí být zajištěno bez diskriminace založené na jakémkoli důvodu, jako je pohlaví, rasa, barva pleti, jazyk, náboženství, politické nebo jiné smýšlení, národnostní nebo sociální původ, příslušnost k národnostní menšině, majetek, rod nebo jiné postavení.

Podle ESLP čl. 9 chrání v první řadě sféru osobní víry a náboženského vyznání, tedy oblast, která je někdy nazývána *forum internum*. Dále chrání úkony, jež jsou úzce spojeny s těmito postoji, jako náboženské obřady, které jsou součástí náboženské praxe v obecně uznávané podobě. Čl. 9 však nezahrnuje možnost libovolného chování uloženého vírou nebo přesvědčením.[11]

Podle čl. 9 odst. 1 má každý právo projevovat své náboženské vyznání nebo přesvědčení sám nebo společeně s jinými. Volba je v tomto případě na konkrétním člověku — státní orgány nemohou provádět tuto volbu za něj a rozhodovat, jestli by v daném případě měla být svoboda náboženského vyznání nebo přesvědčení vykonávána osamoceným jednolivcem nebo komunitou. Omezení je možno ukládat pouze na základě čl. 9 odst. 2.[12] Z ustanovení čl. 9 odst. 1 však není možné vyvozovat právo formálního uznání náboženské společnosti jakožto projevu svobody náboženství vykonávané „společně s jinými“.[13]

Evropská komise a ESLP se nevyjádřili jednoznačně, jestli je výčet „bohoslužeb, vyučování, provádění náboženských úkonů a zachovávání obřadů“ výčtem taxativním, či nikoliv. V praxi však bylo s tímto výčtem zacházeno jako s taxativním, především proto, že „provádění náboženských úkonů“ (v angličtině *practice*) poskytuje dostatečnou šíři pro interpretaci způsobem zahrnujícím většinu myslitelných náboženských projevů.[14]

„Provádění náboženských úkonů“ není právě nejvhodnějším překladem anglického *practice*, což je zřetelné na případu *Arrowsmith v. Spojené království*, který je klíčovým pro

[11] *C. v. Spojené království,* stížnost č. 10358/83 (1983). Odstavec 3, *Porter v. Spojené království,* stížnost č. 15814/02 (2003).

[12] Odstavec 5, *X. v. Spojené království,* stížnost č. 8160/78 (1981).

[13] Evans, *Freedom of Religion under the ECHR*, strana 104. *X. v. Rakousko,* stížnost č. 8652/79 (1981).

[14] *Arrowsmith v. Spojené království,* stížnost č. 7050/75 (1978). Malcolm D. Evans. *Religious Liberty and International Law in Europe*. Anglicky. Cambridge: Cambridge University Press, 1997, strany 304–307. Evans, *Freedom of Religion under the ECHR*, strany 105–106.

jeho výklad. Pat Arrowsmith byla odsouzena pro rozšiřování letáků mezi vojáky, které se snažila odradit od vojenské služby v Severním Irsku. Považovala své odsouzení za porušující svobodu projevovat své pacifistické přesvědčení (porušení čl. 9 a čl. 10 Úmluvy). Evropská komise uznala, že její pacifistické přesvědčení[15] spadá pod ochranu čl. 9, nicméně rozdávání letáků nebylo uznáno jako „provádění náboženských úkonů", neboť letáky údajně nevyjadřovaly její pacifistický pohled na svět.[16]

Komise rozhodla, že z ochrany čl. 9 jsou vyloučeny činy pouze motivované nebo ovlivněné vírou či přesvědčením. Žadatel o ochranu tedy musí prokazovat velmi úzkou spojitost mezi činem a vírou či přesvědčením; musí prokázat, že jeho jednání bylo nutným důsledkem jeho víry či přesvědčení.[17]

„Arrowsmith test" (nebo také „test nutnosti"), ačkoliv není právě nejjasnějším, byl postupně rozšířen také na oblast bohoslužeb (*worship*). Absurdity dosáhl, když Komise rozhodla, že britský muslim neprokázal požadavek islámu, aby se účastnil páteční (společné) modlitby.[18] Problematické je především, jaké důkazy jsou dostačující k prokázání „nutnosti". Soud většinou nebere osobní pocit povinnosti stěžovatele, často ani neprovede důkazy jím navržené[19] a užití expertů či publikací náboženských společností[20] se děje spíše *ad hoc*. Je tedy otázkou, nakolik je možné takový přístup charakterizovat jako přiměřený ochraně náboženské svobody dotčených jednotlivců.

Čl. 9 odst. 2 obsahuje výčet možných omezení náboženské svobody. Druhý odstavec se těší poměrně velkému významu, protože Komise a ESLP používají odst. 1 spíše výjimečně. Ačkoliv by bylo logické nejprve zhodnotit, jestli došlo k porušení náboženské svobody, a teprve potom řešit otázky nezbytnosti a přiměřenosti zásahu (či nečinnosti státu), Soud a Komise odst. 1 přeskakují buď úplně, nebo pouze konstatují, že došlo k zásahu do náboženské svobody. Důsledkem tohoto přístupu je především opomíjení významu a obsahu náboženské svobody jako takové, což se promítá také do hodnocení nezbytnosti a přiměřenosti omezení náboženské svobody státem.

Omezení musí být především stanovena zákonem (právním předpisem). Podle soudu z toho vyplývá, že zákon (právní předpis) musí být občanovi přiměřeně přístupný a jeho formulace musí být dostatečně určitá, aby podle ní mohl občan řídit své chování. Občan tedy musí být schopen předvídat (pokud třeba s nezbytnou odbornou pomocí) v přiměřeném rozsahu následky svého chování. Předvídatelnost samozřejmě neznamená absolutní jistotu, která je dle zkušenosti nedosažitelná, neboť právo musí být dostatečně

[15] Pat Arrowsmith definovala svůj pacifismus jako „oddanost, jak v teorii tak v praxi, filosofii prosazování politických nebo jiných cílů bez použití násilí nebo jeho pohrůžky, a to za jakýchkoli okolností včetně pohrůžky nebo použití násilí."

[16] *Arrowsmith v. Spojené království,* stížnost č. 7050/75 (1978).

[17] *Arrowsmith v. Spojené království,* stížnost č. 7050/75 (1978). Evans, *Religious Liberty and International Law in Europe*, strany 307–312. Evans, *Freedom of Religion under the ECHR*, strana 115.

[18] *X. v. Spojené království,* stížnost č. 8160/78 (1981).

[19] Např. *X. v. Spojené království,* stížnost č. 8160/78 (1981).

[20] Např. zpráva Světové rady církví použitá v případě *Kokkinakis v. Řecko,* stížnost č. 14307/88 (1993).

obecné, aby mohlo reagovat na měnící se okolnosti.[21]

Řada stěžovatelů se snažila v rámci svého případu napadnout i (ne)soulad právního předpisu jako takového s Evropskou úmluvou. Šlo především o předpisy s možností velmi extenzivní interpretace a s neurčitými pojmy.[22] Žádný z takových pokusů však zatím neuspěl.[23]

Pokud je omezení svobody náboženství stanoveno zákonen, ESLP nebo komise zkoumají, zda bylo omezení v daném případě „nezbytné v demokratické společnosti". Soud se otázkou nezbytnosti v demokratické společnosti zabýval v případu *Handyside v. Spojené království*, ve kterém rozhodl, že stát má „prostor pro uvážení" (*margin of appreciation*) v rozhodování o konktrétním omezení za daných okolností. Tento prostor k uvážení je dán především z toho důvodu, že stát ma přímý a soustavný kontakt s děním na svém území a je v lepším postavení pro vykládání pojmů „nutnost", „omezení" a „trest" než mezinárodní soudce. Prostor pro uvážení se vztahuje jak na zákonodárce, tak na soudce a všechny, kteří mají právo interpretovat a aplikovat. Prostor pro uvážení však není neomzenený — ESLP nad ním vykonává dohled.[24]

Carolyn Evans uvádí některé z faktorů ovlivňujících šíři prostoru pro uvážení: míra konsenzu v dané věci mezi členskými státy Rady Evropy, míra zásahu do stěžovatelova soukromého života, důležitost daného práva v demokratické a pluralitní společnosti, okolnosti a skutkový průběh daného případu.[25]

Nutno poznamenat, že doktrína „volného uvážení státu" (*margin of appreciation*) je často používána soudem v případech náboženské svobody v kontroverzních případech, kdy se soud „bojí" rozhodnout ve prospěch stěžovatele, aby příliš nezpochybnil *status quo* (např. uspořádání vztahů mezi státem a církví).

Často záleží na kontextu, v jehož rámci dochází k projevování náboženské víry nebo přesvědčení. Jednou z kontroverzních oblastí jsou veřejné prostory, především státní instituce a vzdělávací zařízení. Před ESLP se dostaly dva zajímavé případy žen, kterým bylo zakázáno nošení muslimského šátku (hidžábu). První z nich, Lucia Dahlab byla učitelkou malých dětí ve Švýcarsku, v průběhu své učitelské praxe konvertovala k islámu a začala nosit hidžáb. Jeho nošení jí bylo zakázáno až po třech letech, v průběhu kterých si na ni nikdo nestěžoval. ESLP rozhodl, že zákaz nošení byl nezbytným v demokratické společnosti, aniž by poskytl důkladné odůvodnění. A důvody, které uvedl stojí minimálně k zamyšlení. Zdůraznil, že malé děti (čtyři až osm let) „žasnou nad řadou věcí a jsou snáze ovlivnitelné než jiní žáci. Za takových okolností nemůže být popřeno, že nošení šátku může mít proselytizující účinky, neboť se jeví jako uložený ženám předpisem ustanove-

[21] Odstavec 49, *Sunday Times v. Spojené království,* stížnost č. 6538/74 (1979).

[22] Např. *Kokkinakis v. Řecko,* stížnost č. 14307/88 (1993) nebo *Manoussakis a další v. Řecko,* stížnost č. 18748/91 (1996).

[23] Evans, *Freedom of Religion under the ECHR*, strana 139.

[24] Odstavec 48 *Handyside v. Spojené království,* stížnost č. 5493/72 (1976).

[25] Evans, *Freedom of Religion under the ECHR*, strana 143.

ným Koránem a je těžké jej skloubit s principem rovnosti pohlaví. Jeví se proto obtížné usmířit nošení islámského šátku se sdělením tolerance, respektu k druhým a především s rovností a nediskriminací, což jsou principy, které musí všichni učitelé v demokratických společnostech předávat svým žákům.“[26] Je otázkou, jak se soud dopracoval k takovým závěrům bez vypořádání se s argumenty pro nošení hidžábu jako ochrana ženy, ženská emancipace nebo skupinová identita muslimek. V odůvodnění ESLP je postaven na hlavu i běžně používaný argument pluralismu, na kterém je vystavěna Evropa; naskýtá se totiž otázka: kde jinde mají evropští žáci lepší možnost seznámit se s příslušníky jiných náboženství než v dialogu s učiteli vyznávajícími takové náboženství?

V případě *Leyla Şahin v. Turecko* nebyla studentka medicíny připuštěna ke zkoušce z důvodu nošení hidžábu, který byl v průběhu jejího studia zakázán. ESLP shledal, že došlo k zásahu do náboženské svobody a existoval zde právní základ pro daný zákaz. Vzhledem k tomu, že legitimita daného zákazu nebyla předmětem sporu mezi stranami, zaměřil se na hodnocení nezbytnosti daného zásahu v demokratické společnosti. Dle Soudu je třeba vzít v úvahu vliv nošení náboženského symbolu, který je možno považovat za náboženskou povinnost, na ty, kteří jej nenosí. V sázce je ochrana „práv a svobod druhých“ a „zachování veřejného pořádku“ v zemi, kde je většina obyvatel jak zastánci rovnoprávného postavení žen a sekularismu, tak vyznávajícími islám. Uložení omezení v daném případě může být nahlíženo jako odpovídající naléhavé společenské potřebě, obzvláště v době, kdy se řada extrémních politických hnutí snaží turecké společnosti vnutit jejich náboženské symboly a pojetí společnosti založené na náboženských základech. Na základě historické zkušenosti jsou státy oprávněny zasáhnout proti takovým politickým hnutím. Omezení byla tedy vnímána jako „zachovávající pluralismus na univerzitě“, odpovídající principu sekularismu a rovnosti mužů a žen před zákonem.[27]

Zarážející je, že hlasování ve velkém senátu skončilo 16:1. Dissentující byla pouze Françoise Tulkens, která zpochybnila spojování pouhého nošení šátku s fundamentalismem a extremismem snažícím se zavést povinné nošení šátku. Upozornila také na víceznačnost hidžábu jako symbolu a poukázala na to, že pokud by bylo nošení šátku proti principu rovnosti mužů a žen, byl by stát povinen zakázat jeho nošení jak na veřejnosti, tak v soukromí.[28]

Právo na vzdělání upravuje čl. 2 prvního protokolu k Evropské úmluvě:

> Nikomu nesmí být odepřeno právo na vzdělání. Při výkonu jakýchkoli funkcí v oblasti výchovy a výuky, které stát vykonává, bude respektovat právo rodičů zajišťovat tuto výchovu a vzdělání ve shodě s jejich vlastním náboženským a filozofickým přesvědčením.

Zatímco rodiče mají právo, aby jejich dítě bylo vychováváno určitým způsobem, nemají

[26] *Dahlab v. Switzerland,* stížnost č. 42393/98 (2001).
[27] *Leyla Şahin v. Turecko,* stížnost č. 44774/98 (2005).
[28] *Leyla Şahin v. Turecko,* stížnost č. 44774/98 (2005).

z Evropské úmluvy nárok na to, aby stát financoval náboženskou a morální výchovu určitého druhu. Stát nicméně může finančně podporovat náboženské (církevní) školy nebo výuku náboženství ve veřejných školách, pokud se k tomu rozhodne.[29]
V případě *Kjeldsen, Busk Madsen a Pedersen v. Dánsko* se snažila dánská vláda prosadit pojetí, podle kterého se druhá věta čl. 2 nevztahuje na státní školy, protože nikdo přeci rodiče nenutí, aby dávali své děti do těchto škol, obzvláště pokud stát výrazně finančně podporuje soukromé školství. Soud však toto pojetí odmítl. Dále zdůraznil, že není možné rozlišovat mezi náboženskými hodinami a jinou výukou; stát musí respektovat přesvědčení rodičů v rámci celého studijního programu. Je totiž prakticky nemožné vyučovat předměty, které by nezasahovaly do oblasti náboženského nebo filosofického přesvědčení; na druhou stranu mnoho náboženství pojednává o většině aspektů lidského života, a tedy se dotýká prakticky všech vyučovaných předmětů. Stát musí dbát na to, aby informace byly podávány objektivním, kritickým a pluralitním způsobem.[30]
Co se týče náplně předmětů zabývajících se filosofií a náboženstvím, ESLP respektuje široký prostor pro uvážení členských států (*margin of appreciation*). V rámci jejich uvážení je také možnost výrazného rozdílu v časové dotaci věnované jednotlivým náboženským systémům, především ve prospěch majoritního náboženství v dané zemi. Tento nepoměr však nesmí být tak výrazný, aby to vedlo k výrazné jednostrannosti, popř. úplnému zanedbání některého minoritního náboženství v dané zemi nebo regionu.[31]

Podle čl. 9 Evropské úmluvy zahrnuje svoboda náboženství také svobodu změnit své náboženské vyznání nebo přesvědčení. Vzhledem k tomu, že ke změně dochází často „s pomocí“ druhého člověka, je tato svoboda spjata s poněkud kontroverzním pojmem proselytismu.
ESLP se zabýval proselytismem ve známem případě *Kokkinakis v. Řecko*. Minos Kokkinakis se narodil do orthodoxní rodiny, nicméně stal se Svědkem Jehovovým, pročež byl podroben řadě trestních stíhání. V Řecku byl totiž proselytismem rozuměn „*především* každý přímý nebo nepřímý pokus zasahovat do víry osoby jiného náboženského přesvědčení za účelem zpochybnění takového náboženského přesvědčení“. V daném případě se pan Kokkinakis společeně se svou ženou dali do rozhovoru s manželkou místního orthodoxního kantora, který na ně pak zavolal policii. ESLP nepřijal argumentaci stěžovatele, že by zákon upravující proselytismus byl neospravedlnitelně vágní, neboť k němu existovala ustálená judikatura.[32]
Soud potvrdil, že čl. 9 v zásadě chrání právo přesvědčovat druhé o svém náboženském přesvědčení, jinak by totiž bylo ustanovení o změně náboženství jen mrtvou literou. Je

[29] Evans, *Freedom of Religion under the ECHR*, strany 88–89.
[30] Odstavce 50–53, *Kjeldsen, Busk Madsen a Pedersen v. Dánsko,* stížnost č. 5095/71, 5920/72 a 5926/72 (1976).
[31] *Folgerø a další v. Norsko,* stížnost č. 15472/02 (2007). *Hasan and Eylem Zengin v. Turecko,* stížnost č. 1448/04 (2007).
[32] *Kokkinakis v. Řecko,* stížnost č. 14307/88 (1993).

však třeba rozlišovat mezi dosvědčováním evangelia a nepatřičným proselytismem.[33] Možnost stanovení této hranice je však, stejně jako legitimita takového dělení, kontroverzní otázkou.

Svoboda náboženství se často dostává do konfliktu se svobodou projevu a judikatura ESLP tuto skutečnost reflektuje. Jedním z prvních případů, který se dostal ke Komisi byl případ švédských scientologů, kteří si stěžovali na infamující soud profesora teologie, který pronesl v průběhu přednášky a následně byl otištěn v místních novinách. Komise zaujala stanovisko, že ze svobody náboženství nevyplývá zákaz kritiky náboženství. Náboženství může být kritizováno, dokud to neohrozí svobodu náboženství jako takovou, popř. dokud nečinnost orgánů veřejné správy nebude moci vést k odpovědnosti státu.[34]
Pozice Komise byla dále rozpracována Soudem v případu *Otto-Preminger-Institut v. Rakousko*. Skutkový děj spočíval v tom, že místní úřady zakázaly promítat film vyobrazující negativně (posměšně) klíčové postavy křesťanství (na popud Římskokatolické církve) a zabavily kopie tohoto filmu. ESLP zdůraznil, že věřící musí tolerovat a přijímat popírání vlastní víry jinými lidmi stejně jako propagaci nauk nepřátelských jejich víře. Nicméně způsob, jakým jsou náboženské přesvědčení a učení napadány, může dosáhnout takové intenzity, že si vynutí zásah státu k zajištění „pokojného výkonu" práv chráněných čl. 9. Respekt k náboženskému cítění věřících může být legitimně považován za narušený v případě provokujícího vyobrazení objektů náboženského uctívání; taková vyobrazení mohou být považována za zlovolné narušení ducha tolerance, který musí být rysem demokratické společnosti. Tedy, kdokoliv využívající svobody projevu se musí vystříhat projevů bezdůvodně urážejících ostatní (tedy porušujících jejich práva), a tak nezpůsobilých k přispění „veřejné debatě podporující lidský pokrok".[35]
Soud zdůraznil, že v není možné vystopovat napříč Evropou jednotný model významu náboženství ve společnosti. Proto není také možné definovat jednotně, které zásahy svobody projevu do náboženského cítění jsou tolerovatelné. Je tedy nutné ponechat státům jistou míru uvážení (*margin of appreciation*).[36]
Přístup vytvořený v *Otto-Preminger-Institut v. Rakousko* byl zopakován i v případech, kdy šlo o předběžný zákaz distribuce krátkého filmu vyobrazujícího extáze sv. Terezy[37] nebo v případu publikace knihy hanící proroka Mohameda.[38] Problémem tohoto přístupu je příliš široký prostor pro uvážení místních (národních) orgánů rozhodujících o tom, co je v dané lokalitě příliš napadající náboženské cítění obyvatel. Ve většině případů tento přístup zvýhodňuje majoritní náboženství, popř. náboženské skupiny, které jsou

[33] *Kokkinakis v. Řecko,* stížnost č. 14307/88 (1993).
[34] *Scientologická církev a jejích 128 členů v. Švédsko,* stížnost č. 8282/78 (1980).
[35] *Otto-Preminger-Institut v. Rakousko,* 13470/87 (1994).
[36] *Müller a další v. Švýcarsko,* stížnost č. 10737/84 (1988). Odstavec 50, *Otto-Preminger-Institut v. Rakousko,* 13470/87 (1994).
[37] *Windgrove v. Spojené království,* stížnost 14719/90 (1996).
[38] *İ.A. v. Turecko,* stížnost č. 42571/98 (2005).

ochotny a schopny ostře zareagovat na kritiku namířenou vůči nim. Skupiny mírnějšího a tolerantnějšího ducha na sebe většinou neupozorní dostatečně intenzivním způsobem, proto je jejich ochrana většinou nedostatečná.
Otázkou také zůstává, zda by bylo možné tento přístup aplikovat i na případy karikatur proroka Mohameda publikovaných nejprve v *Morgenavisen Jyllands-Posten* a následně v dalších médiích. Tento případ se zatím nedostal k přezkoumání meritu věci ESLP.[39]

Svoboda náboženství a Organizace spojených národů

Svobody náboženství se dotýká řada úmluv, deklarací a jiných více či méně závazných dokumentů Organizace spojených národů. Historickým mezníkem je čl. 18 Všeobecné deklarace lidských práv, který se stal inspriací pro řadu dokumentů upravujících svobodu náboženství (např. pro Evropskou úmluvu). Zní následovně:

> Každý má právo na svobodu myšlení, svědomí a náboženství; toto právo zahrnuje v sobě i volnost změnit své náboženství nebo víru, jakož i svobodu projevovat své náboženství nebo víru sám nebo společně s jinými, ať veřejně nebo bohoslužbou a zachováním obřadů.

Mezinárodní pakt o občanských a politických právech měl objasnit a zpřesnit dikci čl. 18 Všeobecné deklarace, ale příliš se mu to nepovedlo. Na vině jsou především rozpory mezi východním a západním blokem a dále spory s islámskými zeměmi, jestli je možné zahrnout svobodu změnit náboženství. Čl. 18 Paktu byl nakonec přijat v následujícím znění:

> (1) Každý má právo na svobodu myšlení, svědomí a náboženství. Toto právo zahrnuje v sobě svobodu vyznávat nebo přijmout náboženství nebo víru podle vlastní volby a svobodu projevovat své náboženství nebo víru sám nebo společně s jinými, ať veřejně nebo soukromě, prováděním náboženských úkonů, bohoslužbou, zachováním obřadů a vyučováním.
>
> (2) Nikdo nesmí být podroben donucování, které by narušovalo jeho svobodu vyznávat nebo přijmout náboženství nebo víru podle své vlastní volby.
>
> (3) Svoboda projevovat náboženství nebo víru může být podrobena pouze takovým omezením, jaká předpisuje zákon a která jsou nutná k ochraně veřejné bezpečnosti, pořádku, zdraví nebo morálky nebo základních práv a svobod jiných.
>
> (4) Státy, smluvní strany Paktu, se zavazují respektovat svobodu rodičů, a tam, kde je to vhodné, poručníků, zajistit náboženskou a morální výchovu svých dětí podle vlastního přesvědčení rodičů nebo poručníků.

[39] Případ *Ben El Mahi a další v. Dánsko,* stížnost č. 5853/06 (2006) nebyl shledán přípustným z důvodu nedostatečné vazby marockých občanů na členský stát, konkrétně Dánsko.

Valné shromáždění OSN si vyžádalo v reakci na antisemitské útoky v roce 1962 vytvoření deklarací a úmluv na odtranění všech forem rasové diskriminace a náboženské netolerance. V případě nástrojů potírajících rasovou diskriminaci šel proces poměrně rychle (deklarace byla hotova v roce 1963 a úmluva v roce 1965), zatímco přijetí Deklarace o odstranění všech forem nesnášenlivosti a diskriminace založených na náboženství či víře se podařilo až v roce 1981 a o úmluvě se již prakticky ani neuvažuje. Od roku 1983 je jmenován zvláštní zpravodaj, který monitoroval nejdříve projevy náboženské nesnášenlivosti a od roku 2000 svobodu víry a náboženství jako takovou.

Svoboda náboženství a Evropská unie

Evropská integrace se po druhé světové válce ubírala především ekonomickou a politickou cestou. Ochrana lidských práv a mezi nimi svobody náboženství nebyla prioritou, ačkoliv se k ní Evropský soudní dvůr postupem častu dopracoval.
Jakmile začaly být cíle ekonomické a politické integrace ve větší míře naplňovány, sílily hlasy po prohloubení integrace i do jiných oblastí, jako je např. kultura a vzdělávání. V tomto duchu se rozjela řada projektů a programů; za zmínku stojí např. vyhlášení roku 2008 rokem mezikulturního dialogu (ačkoliv je zde tendence vyhýbat se náboženským otázkám na oficiální rovině, v praxi se mezikulturní dialog zakládá z nemalé části na dialogu mezináboženském).

Do evropského práva se ochrana náboženské svobody dostala zvláštní oklikou přes antidiskriminační legislativu. Amsterdamská smlouva totiž přinesla čl. 13 SES opravňující Radu na návrh Komise a po konzultaci s Evropským parlamentem jednomyslně přijmout vhodná opatření k boji proti diskriminaci na základě pohlaví, rasového nebo etnického původu, náboženského vyznání nebo světového názoru, zdravotního postižení, věku nebo sexuální orientace. Navzdory očekáváním byl čl. 13 SES naplněn po krátkem čase dvěmi směrnicemi: směrnicí Rady 2000/78/ES ze dne 27. listopadu 2000, kterou se stanoví obecný rámec pro rovné zacházení v zaměstnání a povolání a směrnicí Rady 2000/43/ES ze dne 29. června 2000, kterou se zavádí zásada rovného zacházení s osobami bez ohledu na jejich rasu nebo etnický původ.
Je otázkou, nakolik se směrnice 2000/43/ES vztahuje na diskriminaci z důvodu náboženství. Vztahuje se totiž jen na případy, kdy je pro určitou etnickou skupinu charakteristické určité náboženství, což je příklad třeba židů. Směrnice 2000/78/ES stanoví obecný rámec pro boj s diskriminací na základě náboženského vyznání či víry jako jeden z důvodů diskriminace — je tedy přímo namířena na ochranu náboženské svobody. Mohlo by se tedy zdát vhodnější používat pro diskriminaci na základě náboženství rámcovou směrnici 2000/78/ES, nicméně jejím problémem je výrazně užší působnost. Zatímco se směrnice 2000/43/ES vztahuje na všechny níže uvedené oblasti, směrnice 2000/78/ES se vztahuje pouze na body a)–d):

a) podmínky přístupu k zaměstnání, samostatně výdělečné činnosti nebo do pracovního poměru včetně kritérií výběru a podmínek náboru, bez ohledu na obor činnosti a na úroveň profesní hierarchie včetně pracovního postupu;

b) přístup ke všem typům a úrovním odborného poradenství, odborného vzdělávání, zdokonaleného odborného vzdělávání a rekvalifikace včetně získávání praktických zkušeností;

c) podmínky zaměstnání a pracovní podmínky včetně podmínek propouštění a odměňování;

d) členství a účast v organizaci pracovníků nebo zaměstnavatelů nebo v jakékoli organizaci, jejíž členové vykonávají určité zaměstnání včetně výhod poskytovaných těmito organizacemi;

e) sociální ochranu včetně sociálního zabezpečení a zdravotní péče;

f) sociální výhody;

g) vzdělání;

h) přístup ke zboží a službám, které jsou k dispozici veřejnosti včetně ubytování, a jejich dodávky.

Naskýtá se tedy otázka „diskriminace na základě antidiskriminačních směrnic“, neboť čl. 13 SES jistě nezamýšlel, aby byla rozdílná ochrana poskytována třeba židům a adventistům v jejich požadavku na zvláštní stravu ve školních jídelnách.
Obě směrnice stanovují „zásadu rovného zacházení“, kterou se rozumí zákaz přímé nebo nepřímé diskriminace z důvodů, na které se směrnice zaměřují, pro naše účely tedy z důvodu etnického původu, náboženského vyznání nebo víry. Směrnice 2000/78/ES pak stanoví také výjimku pro církevní organizace, resp. organizace založené na „náboženském étosu“ (jde např. o požadavek římskokatolické víry pro římskokatolického kněze).

Svoboda myšlení, svědomí a náboženství je spolu s právem na vzdělání a respektem ke kulturní, náboženské a jazykové rozmanitosti obsažena v Chartě základních práv EU vyhlášené 7. prosince 2000. Charta pak byla v mírně upraveném znění znovu vyhlášena 12. prosince 2007 ve Štrasburku před podpisem Lisabonské smlouvy. Pokud dojde k úspěšné ratifikaci Lisabonské smlouvy, dostane se Charta na úroveň primárního práva. Účinná Lisabonská smlouva by také znamenala přístup Evropské unie k EÚLP a nastoupení otevřeného, transparentního a pravidelného dialogu evropských institucí s náboženskými organizacemi.[40]

[40] Čl. 6 a 17 Smlouvy o fungování Evropské unie.

Závěr

Svoboda myšlení, svědomí a náboženství je jedním ze základů demokratické společnosti. Na této formulaci Evropského soudu pro lidská práva se shodne jak většina myslitelů, tak institucí. Názory se však začínají velmi různit, jakmile se dojde k obsahu této svobody, popř. nutnosti vyvažovat náboženskou svobodu s právy a svobodami jinými.
Svoboda náboženství sdílí s „náboženstvím“ velmi obtížnou definovatelnost, což se jeví jako obzvláště problematické pro právo. Většina přístupů promítajících se do (soudní) praxe se snaží manévrovat mezi extrémem přesné a předvídatelné definice — a přístupem považujícím za náboženství (víru) hodnou ochrany cokoliv, co si konkrétní subjekt zamane. Díky tomuto „manévrování“ je však spíše výjimkou najít koherentní přístup k dané problematice i v rámci jedné instituce, jako je třeba Evropský soud pro lidská práva. Analýza řady případů a spletitých cest vyjednávání mezinárodních dokumentů ukazuje, že oblastí, ze které pramení velká řada pnutí a střetů je rozlišování či nerozlišování mezi *forum internum* a *forum externum*. Je proto těžké si představit prohlubování svobody náboženství a její ochrany bez nalezení přístupu, který by se dokázal s tímto rozlišováním vypořádat způsobem, jež by ctil lidskou důstojnost a náboženské směřování každého individua.